(30,416)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 95.

A. G. RISTY, et al, as County Commissioners, etc. et al.,
Appellants,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Appellee.

BRIEF OF APPELLEE.

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SUBJECT INDEX.

TABLE OF CASES.

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BRIEF OF APPELLEE.

STATEMENT OF FACTS.

This is an appeal from a judgment of the Circuit Court of Appeals of the Eighth Circuit, affirming a judgment of the District Court of the District of South Dakota, Southern Division. For the opinion of the courts below, see

Chicago, R. I. & P. Ry. Co. v. Risty et al., 282 Fed. 364 (District Court);

Risty et al. v. C. R. I & P. Ry. Co., 297 Fed. 710 (Circuit Court of Appeals).

The Circuit Court's judgment of affirmance was entered March 18, 1924. The record was filed in this court on June 16, 1924, and was printed and in the hands of counsel prior to November 11, 1924. Almost a year later, on October 26, 1925, appellants' brief was served.

Appellants' brief would indicate that the facts are complicated. While the case is an important one, the facts necessary to a decision are comparatively simple. A concrete statement of the essential facts for which we have searched appellants' brief in vain, will, we think, be of aid to the court.

This action was originally brought by the Chicago, Rock Island & Pacific Railway Company, a corporation organized under the laws of Illinois, against the Board of County Commissioners of Minnehaha County, South Dakota, and the Auditor and Treasurer of that County, to enjoin the defendants (the appellants in this court) from making any apportionment of benefits, or from levying or collecting any assessment against the property of the Railway Company on account of the construction of "Drainage Ditch No. 1 and 2", in Minnehaha County.

Pursuant to permission duly granted (R. 21-22), certain banks which had purchased warrants of the County for this work, intervened, aligning themselves on the side of the county officials. The case was heard by Judge Elliott, Judge of the District Court of South Dakota, who filed an exhaustive opinion, holding that plaintiff was entitled to the injunction prayed for (R. 81-101). This opinion is reported in

Chicago, R. I. & P. Ry. Co. v. Risty et al., 282 Fed. 364.

A final decree was entered perpetually restraining the defendants (appellants here) from apportioning, levying or collecting any assessment against plaintiff's property (R. 101-103).

From this decree the county officials and the intervening banks appealed to the Circuit Court of Appeals. It was claimed by the appellants that the assessment in question was authorized by Sections 8458 to 8491, Revised Code South Dakota, 1919. This law is said to be reproduced in full in Appendix B of Appellants' Brief, pages II-XVI, but appellants have omitted printing Sec. 8470, upon which the case was decided against them. See appendix to this brief.

The Circuit Court of Appeals affirmed the lower court, the opinion being found on pages 249-263 of the Record, and reported in 297 Fed. 710. From the Circuit Court of Appeals, the intervening bankers and the county officials appealed to this court (R. 265). They likewise, at the same time, filed an application for a writ of certiorari, but this application this court denied.

The statement of facts contained in Judge Kenyon's opinion in the Circuit Court of Appeals cannot be improved upon (R. 249-253). For a ready grasp of the situation however, it may be shortened by eliminating certain facts not bearing directly upon the points to be decided.

On July 1, 1917, William H. Lyon filed with the County Board of Minnehaha County, his petition for the establishment of a drainage ditch (R. 123-124). On December 31, 1907, the County Board pursuant to this petition, passed a resolution establishing "Drainage Ditch No. 1" (R. 125, 126). On April 11, 1908, the County Board passed a resolution assessing benefits for this ditch against the property benefited (R. 129-130). Later these assessments were equalized, levied, and fully paid. The entire cost of Drainage Ditch No. 1, was $46,600.10 (R. 131).

On April 10, 1908, Iver R. Peterson, et al., filed with the County Board a petition for the establishment of another

drainage ditch through territory adjacent to that served by Drainage Ditch No. 1 (R. 131-133). On January 8, 1909, a petition by A. L. Berg, et al. was filed asking for an extension of this ditch (R. 133-134). On May 6, 1918, the Board passed a resolution acting on these petitions, establishing "Drainage Ditch No. 2" (R. 137-138). On October 7, 1910, the Board assessed the benefits arising by reason of the construction of this Drainage Ditch No. 2. These assessments were equalized, levied and thereafter paid. The total cost of Drainage Ditch No. 2, was $81,006.19 (R. 138-144).

In none of the proceedings with respect to either Drainage Ditch No. 1, or Drainage Ditch No. 2, were any of the properties of the Chicago, Rock Island & Pacific Railway Company mentioned as being subject to assessment, nor was any assessment of benefits made against the Railway Company, or any of its properties.

Drainage Ditch No. 1, combined with Drainage Ditch No. 2, ran in a general northerly and southerly direction, adjacent to the Sioux River. The two ditches were in reality one, although established separately. Ditch No. 2 emptied into Ditch No. 1, which in turn emptied into Sioux River by a spillway. A reference to Great Northern's Exhibit 1, page 185 of the Record, shows the situation at a glance. In red is shown "Drainage Ditch No. 1 and 2" which will presently be mentioned and which is the subject of this suit, but as appears from the Record and will be hereafter pointed out, "Drainage Ditch No. 1 and 2" was located in exactly the same place and along the identical route as that traversed by Drainage Ditch No. 1 and Drainage Ditch No. 2 combined.

Will the Court please distinguish between "Drainage Ditch No. 1" and "Drainage Ditch No. 2," and "Drainage Ditch No. 1 and 2." It is important that this distinction be borne in mind.

Hereafter, for convenience, we shall refer to the property which was assessed for the establishment of Drainage Ditch No. 1 and Drainage Ditch No. 2, as the "old assessment district." This appellee, the Chicago, Rock Island & Pacific Railway Company had no property whatever in the old assessment district and was not assessed for the construction of either Drainage Ditch No. 1 or Drainage Ditch No. 2.

In 1915, the spillway through which Drainage Ditch No. 1 emptied into the Sioux River, was washed away. What occurred at this time can best be stated by quoting from the opinion of the trial court:

> "In 1915 the force of the waters conducted by these two drainage ditches was so great as to wash out what is called the spillway, through the bluff adjacent to the point where the waters from the ditches entered the river. The ditches in the meantime also became out of repair, and at one point several miles above the City where the ditch approached the river, the water was cutting from the river into the ditch, threatening to turn the entire course of the Sioux River at this point into the ditch, and through the ditch back into the river, leaving the Sioux River from that point and for about twelve miles around to where the ditch flowed into the river, without water. The spillway from the ditch through the bluff down into the river was so unskillfully, inefficiently and unscientifically constructed that it would not stand the force of the water with a fall of one hundred feet into the river. It was washed out, and the bluff being of soil and sand, washed out of the entire depth of the river and began washing back through the bluffs, threatening to cut clear back to a point where the water cut through from the river to the ditch, thus taking away from the City of Sioux Falls the benefits of the river, its sewer system and the advantages of the stream, and take the water from the plaintiff, The Northern States Power Company, that naturally

flowed down the river except for the interference by this drainage ditch. And in the cutting into this bluff also threatened to cut into the gravel bed in which the water supply of the City is located, a few miles west of it, and thus drain and destroy and take away from the City of Sioux Falls, its water supply. This was the situation in 1916." (R. 92.)

In this situation is was of course necessary that something be done. A petition was filed asking that a portion of Drainage Ditch No. 1 be abandoned. Later this petition was withdrawn, and on August 3, 1916, F. L. Blackman, et al. filed a petition reciting that Drainage Ditch No. 1, and Drainage Ditch No. 2, were insufficient, and asking for the establishment of a ditch along the same identical route as that traversed by the two ditches theretofore established. This petition was entitled: "A petition to reconstruct and improve Drainage Ditches Nos. 1 and 2, etc." (R. 42). The petition recited that it would be necessary to "reconstruct, deepen, widen and improve said Drainage Ditches Nos. 1 and 2 (R. 43-44). It was obvious that in order to make either of the ditches function at all, it was necessary to spend a large amount of money, and to accomplish this purpose, the Board conceived the plan of going through the form of making a new ditch out of the two old ones. Therefore, on October 2, 1916, it passed a resolution establishing what it was pleased to term "Drainage Ditch No. 1 and 2" *over the same identical territory and located along exactly the same route* which was traversed by Drainage Ditch No. 1, combined with Drainage Ditch No. 2 (R. 50-54). A notice of this hearing was given by publication to "all persons affected." While certain railways were mentioned in this notice as likely to be benefited by the establishment of the ditch, the Rock Island was not mentioned (R. 55-64).

The only difference between "Drainage Ditch No. 1 and 2," and Drainage Ditch No. 1 combined with Drainage Ditch No. 2, was that the old ditches were widened, and the spillway strengthened and improved. As already indicated "Drainage Ditch No. 1 and 2" so-called, traversed the identical route occupied by the two old ditches. The only work done in constructing this new ditch so-called, was to clean out and widen the old ditches, and rebuild the spillway. The Board proposed to assess for this new ditch so-called, not only all property included in the old assessment district, but also certain additional property, which additional property will be designated for convenience as the "new assessment district." The Rock Island had as indicated no property in the old assessment district, but it did have property within the new district, although it never had any notice of intention to assess this property within the new assessment district until the tentative assessment was made.

On June 10, 1921, the Board, without notice of any kind or character to anyone, by resolution fixed the proportion of benefits on "Drainage Ditch No. 1 and 2." The properties of the Rock Island all in the new "assessment district, were assessed 839.45 units, out of 32,549.62 units. Each unit was fixed at $9.50. A mere mathematical computation shows that the amount of the Rock Island assessment was therefore $7,974.78. As already indicated, the Rock Island had no notice that the Board contemplated assessing its properties until it fixed the proportion of benefits on June 10, 1921.

After the proportion of benefits were fixed, the Board fixed August 1, 1921, in the Auditor's office "as the time and place for equalizing the proportion of benefits" (Exhibit C, R. 19). This notice was the first intimation to the Rock Island of any assessment.

On July 25, 1921, this action was commenced; and the defendants restrained from proceeding with the assessment. After a hearing before three judges, as required by the Judicial Code, a temporary injunction was issued. The case was thereafter heard before Judge Elliott, and on Feb. 8, 1922, a final decree permanently enjoining the defendants from in any way proceeding with the assessment was issued (R. 101-103).

Five other cases were commenced by certain other railways, the Northern States Power Company, and the City of Sioux Falls, to restrain similar assessments against their property. All six cases were tried together, and substantially similar decrees entered in each. Upon appeal to the Circuit Court of Appeals, all six cases were argued together and determined by one opinion (R. 247-264). Each one of these cases is now by separate appeal before this court, appellants having presented their views in all six cases by one brief.

In the bill of complaint, the following grounds were asserted as the basis of an injunction against the assessment:

(1) The statute of South Dakota, under which the Board assumed to establish the ditch, was unconstitutional and repugnant to the due process of law clause of the Fourteenth Amendment to the Constitution of the United States.

(2) Even though the Statute were not unconstitutional, yet the establishment of "Drainage Ditch No. 1 and 2" the new ditch so-called, was a mere evasion and subterfuge for repairing Drainage Ditch No. 1 and Drainage Ditch No. 2, and that since by the South Dakota statute, the Board was limited to assessing for repairs, the lands which had been originally assessed for building the two old ditches, the Board had no jurisdiction to assess for "Drainage Ditch No. 1 and 2," any lands not originally assessed for building Drainage Ditch No. 1 and Drainage Ditch No. 2.

(3) That the assessment was partial, inequal and discriminatory in that the lands of plaintiff were assessed upon an entirely different basis from other lands.

The District Court held against us on the first proposition; ruling that the South Dakota drainage statute was not repugnant to the Federal Constitution, but ordered an injunction upon the second and third grounds.

The Circuit Court of Appeals upheld the District Court on one ground alone, namely that the South Dakota drainage statute properly construed did not authorize an assessment for repairs to a drainage ditch except upon the land originally assessed for its construction, and that the establishment of this new ditch, so-called, was a subterfuge, and that no lands lying outside of the old assessment district were subject to assessment. As to the constitutionality of the drainage statute, the Circuit Court of Appeals said:

> "It is earnestly contended by the appellee that the entire South Dakota drainage law is unconstitutional not only as violative of the due process of law clause of the Fourteenth Amendment of the Federal Constitution, but also Sections 2 and 13, of Article VI of the South Dakota Constitution. The constitutional questions raised are grave, serious and doubtful. Their determination is not necessary to the solution of this case. Therefore under the well established rule that the Federal courts will not pass upon the constitutionality of statutes unless absolutely necessary, we leave the questions aside." (R. 253-254).

The claims of the appellee are particularly set forth in the summary of the argument immediatly following.

SUMMARY OF ARGUMENT.

I.

There is no Federal question now in the case, because the only Federal question was decided by the lower courts in appellants' favor. Hence the appeal should be dismissed.

Defiance Water Co. v. Defiance, 191 U. S. 184,
Arbuckle v. Blackburn, 191 U. S. 405,
Empire State Co. v. Hanley, 198 U. S. 292,
Shulthis v. McDougal, 225 U. S. 561,
Lovell v. Newman & Son, 227 U. S. 412,
Henningsen v. U. S. Fidelity & Guaranty Co., 208 U. S. 404,
Anglo-American Provision Co. v. Davis Provision Co., 191 U. S. 376,
Browne v. Union Pacific, 267 U. S. 255.
Hammond v. Johnston, 142 U. S. 73,
Enterprise Irrigation District v. Canal Co., 243 U. S. 157,
United States v. Jahn, 155 U. S. 109,
McLish v. Roff, 141 U. S. 661,
Robinson v. Caldwell, 165 U. S. 359.

II.

The court below had Federal equity jurisdiction because of diversity of citizenship and because:

(a) Plaintiff (appellee) had no adequate remedy at law.
Upshur v. Rich, 135 U. S. 467,
U. S. Life Ins. Co. v. Cable, 98 Fed. 761,
Reagan v. Farmers Loan & Trust Co., 154 U. S. 362.
Smyth v. Ames, 169 U. S. 466,
Sheffield v. Witherow, 149 U. S. 574,

Paine v. Ward, 138 Pac. 967,
Union Pacific v. Cheyenne, 113 U. S. 516,
Green v. Railway, 244 U. S. 499,
Union Pacific Ry. v. Board, 217 Fed. 540.

(b) More than $3,000 was in controversy in this action.
Western and Atlantic Ry. v. Railroad Commissioners, 261 U. S. 264,
Butte & Superior Copper Co. v. Clark, 249 U. S. 12.

(c) The suit was not prematurely brought.
Milheim v. Moffat Tunnel Imp. Dist., 262 U. S. 710.

III.

The South Dakota drainage statute is unconstitutional because repugnant to the Fourteenth Amendment to the Federal Constitution.

Norwood v. Baker, 172 U. S. 269,
Gast Realty Co. v. Snyder Granite Co., 240 U. S. 55,
Martin v. District of Columbia, 205 U. S. 135,
Road Improvement Dist. No. 2 v. Missouri Pacific, 275 Fed. 600,
Turner v. Wade, 254 U. S. 64,
Central Railway of Georgia v. Wright, 207 U. S. 127,
Londoner v. City and County of Denverm, 210 U. S. 373,
Fall Brook Irrigation Dist. v. Bradley, 164 U. S. 12,
Soliah v. Heskin, 222 U. S. 522,
Kansas City Ry. Co. v. Road Improvement District No. 6, 256 U. S. 658.

IV.

The establishment of "Drainage Ditch No. 1 and 2" was a mere subterfuge for repairing the old ditches, hence is governed by the South Dakota law relating to repairs. Since assessments for repairs can only be made against the property assessed for the original construction of the ditch, such assessments cannot be levied against the Rock Island property in the new assessment district which was not assessed for the original construction of the old ditches.

Gilseth v. Risty, 193 N. W. 132.

Sec. 8470, Revised Code of South Dakota 1919.

V.

The assessment of plaintiff's property constitutes a discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law.

Thomas v. Kansas City Southern Ry Co., 277 Fed. 708,

Thomas v. Kansas City Southern Ry. Co., 261 U. S. 481.

VI.

Plaintiff (appellee) is not estopped by its conduct to contest the validity of the assessment of its property.

ARGUMENT.

I.

THERE IS NO FEDERAL QUESTION FOR THIS COURT'S DETERMINATION, AND THE APPEAL SHOULD BE DISMISSED.

The exact situation in which this case reaches this court, should be borne in mind. The bill alleged two grounds for Federal jurisdiction: (1) diversity of citizenship and jurisdictional amount; and (2) that the case arose under the Constitution of the United States because the state drainage statute under which the defendants were proceeding violated the Fourteenth Amendment.

The District Court held that the state statute was valid, but construing it, held that it did not permit the assessment which the county authorities were making. In other words, the appellants were successful on the only Federal question.

The Circuit Court of Appeals in affirming the lower court, expressly refused to consider the Federal question, because a determination of it was unnecessary but sustained the lower court on non-federal grounds, to-wit: in its construction of the statute. Again, appellants were successful in repelling an attack on the law on constitutional grounds.

In other words, the court below has eliminated from this cause any claim of invalidity of the statute, by holding that the statute is valid, leaving the case at the present time so far as the merits are concerned, exactly as though the appellee had never attempted to insist that the statute should be stricken down. Counsel vigorously assert that the constitutional question asserted in our bill is so frivolous and unsubstantial as not to present a Federal question, or to constitute the basis

of Federal jurisdiction. Although both courts below refused to sustain our position as to the unconstitutionality of the statute, both courts held that the question was substantial. However, assuming counsel's position that the Federal question was without sufficient substance to form a basis of Federal jurisdiction, it certainly does not help counsel in sustaining this court's jurisdiction, because if his claim is true the only basis of Federal jurisdiction was diversity of citizenship.

Clearly under the act of February 13, 1925, appellants would have no right to appeal to this court. But since the judgment below was entered and the appeal taken prior to May 13, 1925, the question of this court's jurisdiction depends upon the law as it existed prior to the amendment.

Under Section 241 of the Judicial Code, this court had appellate jurisdiction of the Circuit Court of Appeal's judgments involving $1,000 "where the judgment or decree of the Circuit Court of Appeals is not made final." Section 128 of the Judicial Code provided that "the judgments and decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction is dependent entirely on the opposite parties being * * * citizens of different states." If counsel are right in their position that the claim of unconstitutionality of the state statute asserted in the bill is so unsubstantial as to give no basis of Federal jurisdiction, then the only basis of jurisdiction of the court below is diversity of citizenship, and the judgment of the Circuit Court of Appeals is under the broadest construction of Section 128, final. But while we assert that the courts below had jurisdiction on two grounds, it is our position that since appellants were successful in the court below in resisting an attack on the statute, they cannot make the issue upon which they were successful a basis of appeal to this court on another proposition. If this court

should consider the constitutionality of the statute it could not affect the ultimate result. If this court held the statute constitutional, it would leave the case exactly where the Circuit Court of Appeals started. If it held the statute unconstitutional, it would only add another reason for affirmance of the court below.

It is well established that a suit does not arise under the Constitution of the United States "unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution *upon the determination of which the result depends.*

Defiance Water Co. v. Defiance, 191 U. S. 184,
Arbuckle v. Blackburn, 191 U. S. 405,
Empire State Co. v. Hanley, 198 U. S. 292,
Shulthis v. McDougal, 225 U. S. 561,
Lovell v. Newman & Son, 227 U. S. 412,
Henningsen v. U. S. Fidelity & Guaranty Co., 208 U. S. 404.

It is apparent that the result of this case in this court does not in any way depend upon the determination of whether the statute of South Dakota is constitutional or unconstitutional. So far as this court is concerned it depends only upon the construction to be given to the state statute. No decision of this court could place appellants in any stronger position so far as may concern the validity of the state statute than did the decision of the Circuit Court of Appeals. Appellants were entirely successful on that issue. They cannot therefore in effect appeal from a decision in their own favor by making their success a means of access to this court.

This court has squarely decided this proposition at least twice; (1) in the case of *Empire State Co. v. Hanley,* 198 U. S. 292, where the court said:

> "Appellants succeded in their defense as to the one-third interest, and Hanley accepted the result on the second appeal. *They now make a grievance of their own success* and ask that the supposed *constitutional question* as to the third interest only be made the basis of jurisdiction here, although, if the decree disposed of any such question, *it was in their favor.* In our opinion this cannot be permitted.

(2) In the case of *Anglo-American Provision Co. v. Davis Provision Co.*, 191 U. S. 376, the court said:

> "If a party comes into the Circuit Court alleging that a state law is unconstitutional, and the Circuit Court decides for him on that point, the mere fact that there was such a question in the case does not authorize him to appeal to this court on grounds that otherwise would not support an appeal."

It is true that this language was used with reference to a direct appeal to this court from a Circuit (now District) Court. But it applies with equal force to our situation.

In *Brown v. Union Pacific*, 267 U. S. 255, 45 Supreme Court Reporter, 315, this court affirmed the rule laid down in *Hammond v. Johnston*, 142 U. S. 73, and *Enterprise Irrigation District v. Canal Co.*, 243 U. S. 157, and numerous other cases cited in the last mentioned decision, that where a decision of the court below is placed upon two grounds, one Federal and the other nonfederal, this court will not consider the Federal question when the nonfederal ground is sufficient to support the judgment. It is true that these cases dealt with writs of error to the state courts, but no reason is perceived why the same doctrine should not apply to an appeal from the Circuit Court of Appeals.

In short, there is nothing for the court to determine here but the construction of the South Dakota statute. This is purely a nonfederal question with which this court is not concerned.

It is true that the appellants have attacked the jurisdiction of the court below on many grounds which will be discussed later, among them, lack of jurisdictional amount and lack of ground for equitable relief. It is perhaps true that appellants could have gone directly to this court on these jurisdictional questions under Section 238 of the Judicial Code. See *United States v. Jahn*, 155 U. S. 109, where the court said on page 155:

> "If the question of jurisdiction is in issue, and the jurisdiction sustained and judgment on the merits is rendered in favor of the plaintiff, then the defendant can elect either to have the question certified and come directly to this court, or carry the whole case to the Circuit Court of Appeals, and the question of jurisdiction can be certified by that court."

But since appellants elected to go to the Circuit Court of Appeals on all questions, the only right to obtain a decision of this court on the question of jurisdiction was by writ of certiorari from this court under Section 240, or by the Circuit Court of Appeals certifying the question to this court under Section 239.

Appellants did not ask the Circuit Court of Appeals to certify the question under Section 239, nor did that court do it of its own motion. Appellants did apply for a writ of certiorari from this court under Section 240, but that writ was denied.

Appellants are not entitled as a matter of right, to a decision of this court on the jurisdiction question after they have appealed to the Circuit Court of Appeals. They would perhaps be entitled to a determination of it by certiorari, if this court saw

fit to grant such a writ, but this court has already refused such an application. See

McLish v. Roff, 141 U. S. 661,

Robinson v. Caldwell, 165 U. S. 359.

In the latter case, this court said:

> "After the final decree upon the merits in the Circuit Court of Appeals this court under the circumstances stated, could properly take cognizance of the case in respect to any question involved in it *only upon certiorari.*"

This court should therefore decline jurisdiction.

What is said in the remainder of this brief becomes material only in the event that this court should reach the conclusion that it will consider on the merits the various propositions asserted in appellants' brief.

II.

Jurisdiction of Court Below.

It has been determined by three courts that the court below properly exercised its equitable jurisdiction to-wit by:

(1) The three judge court.

(2) The District Court.

(3) The Circuit Court of Appeals.

Nevertheless, appellants again urge that the District Court had no jurisdiction to determine the case at all, because:

(a) Plaintiff had an equitable remedy at law.

(b) The jurisdictional amount of $3,000 was not in controversy.

(c) The action was prematurely brought.

(a) *Adequate Remedy at Law.*

It is urged by the appellants that the plaintiff had a plain, adequate remedy at law, the contention being that such remedy at law consisted in the right to appear before the County Commissioners in response to the notice of equalization of benefits, and if dissatisfied with the decision of the Board, to appeal to the state court. This is not true for several reasons, (1) If with respect to the plaintiff, the county officials have acted in excess of the authority given them by law, they have no jurisdiction, and plaintiff cannot be required to submit to a body without jurisdiction. (2) It has been uniformly held that the plain, adequate and complete remedy at law referred to by Section 267 of the Judicial Code refers to a common law remedy in the Federal courts.

Counsel asserts without citation of authority that after appeal to the state court the Railway Company could remove the case to the Federal Court. This is not correct, because such a proceeding is not a suit "of a civil nature," and it is only a suit of a civil nature that can be removed.

Upshur v. Rich, 135 U. S. 467.

In the case of *United States Life Insurance Co. v. Cable,* 98 Fed. 761, 31 C. C. A. 264, a decision by the Circuit Court of Appeals of the Seventh Circuit, the following rule is laid down:

> "It must, we think, be conceded that the bill in this case alleges facts constituting a good cause of action in equity for the cancellation of the policy unless the plaintiff has a full and adequate remedy at law for the same cause. A suit at law has been commenced in the state court of Illinois to recover upon the policy, and if it be an adequate remedy at law to turn the plaintiff over for litigation of its rights in the state court under the circumstances set out in the bill, then the United States Circuit Court in equity

should disclaim jurisdiction. But there are two reasons why we think the remedy thus open to the plaintiff of having its rights determined in an action at law does not meet the requirements of the rule. The first is that the plaintiff, being a citizen of New York and the defendant a citizen of Illinois, the plaintiff under the constitution has the right to come to the federal court for an adjudication. *For a person entitled to litigate in the federal court, it is not an adequate remedy at law to be invited into a state court by his antagonist to adjudicate his rights.* * * * The remedy at law in order to defeat the right to proceed in equity should be full and adequate. It should be as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. * * * In the federal courts it is well settled that the court will not turn a suitor in equity over to a remedy at law in the state courts, but only to the law side of the federal court."

In the case of *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 362, the Supreme Court of the United States said:

> "Whenever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the federal courts to maintain a like defense. *A state cannot tie up a citizen of another state having property rights within its territory invaded by unauthorized acts of its officers to suits for redress in its own courts.*"

This was quoted and cited with approval in the case of *Smythe v. Ames*, 169 U. S. 466 (517).

See also *Sheffield v. Witherow*, 149 U. S. 574.

The plaintiff was entitled to litigate the validity of the assessment in a Federal court because of diversity of citizenship,

and as we shall later point out, more than $3,000 was involved. Since it was entitled to maintain its rights in the Federal Court, and since there was no law action maintainable *in the Federal courts* available to the plaintiff, there was no plain and adequate remedy at law, and plaintiff was entitled to equitable relief in the Federal courts.

This sufficiently establishes that there was no adequate remedy at law, but in addition under Section 8464, these assessments when and if made, would be "valid and perpetual liens upon the respective tracts so assessed." These apparently valid but in reality invalid liens would cast a cloud on plaintiff's title. Such facts furnish a further ground for equitable relief because of no adequate remedy at law.

Paine v. Ward, 138 Pac. 967,

Union Pacific v. Cheyenne, 113 U. S. 516,

Green v. Railway, 244 U. S. 499.

Of course if the cloud upon the title to plaintiff's property could be removed by paying the assessment, and suing (in the Federal courts) to get the amount so paid back, this might provide an edequate remedy at law.

Union Pac. Ry. v. Board, 217 Fed. 540.

But there is no such remedy under the South Dakota statute. Once the assessment attaches there is no way in which its lien can be removed other than by a suit in equity.

b. *Jurisdictional Amount.*

The bill of complaint alleges that the amount in controversy is more than three thousand dollars ($3,000.00). The record shows that the Board of County Commissioners by resolution fixed the proportion of benefits against the Rock Island as

839.45 units out of a total of 32,549.62 units. The records of the County Commissioners show that approximately $255,000 worth of warrants had been issued, and that the amount due on them at the time the suit was brought was about $300,000. A mere mathematical computation, therefore, shows that a unit is about $9.50, and that the amount as fixed by the board against the Rock Island is slightly less than $8,000.

It is our contention that this amount has been fixed by the board against the plaintiff and that the only redress which the plaintiff has is to convince the board that this proportion was wrong. The board has therefore already acted and it has determined that the amount due from the Rock Island is about $8,000, unless the railroad should in some way convince them that their conclusion was erroneous.

Furthermore, this is not the end of the liability sought to be imposed against the railroad company. If the property of the railroad is brought within the territory benefited by the ditch, this property will be within that district for all time to come, and any future repairs whic hhave to be made against this ditch or spillway will be assessed in the same proportion against the railway property. The evidence shows that already the present spillway is being endangered by the washing out of water at its foot, and the time is soon coming when more money will have to be expended for its maintenance, and if this spillway should wash out there is no way in which it can be determined what amount will be in the future assessed against the Railway Company.

In view of these facts and the decision of this Court in the case of *Western & Atlantic Ry. v. Railroad Commission*, 261 U. S. 264, it can hardly be contended that $3,000 is not involved in this suit. This also shows conclusively that there was an irreparable injury.

Appellants claim, as we understand it, that since all steps necessary to make this assessment a lien to an amount exceeding $3,000 had not been completed that $3,000 was not involved in the proceeding. Appellants' claim is that it does not appear that there *was any amount whatever involved* (Pages 72-75 of their brief).

But in their petition for the allowance of an appeal, they allege (R. 267-270) "The controversy between appellants and appellee involves an actual controversy of over more than $1,000."

If it does not appear that anything is involved, how can $1,000 be involved to sustain the jurisdiction of this court? The very claim which appellants make, if taken seriously, deprives this court of appellate jurisdiction.

Butte & Sup. Copper Co. v. Clark, 249 U. S. 12, does not help counsel out of this dilemma in the least. This case rules that litigants both plaintiff and defendant must be consistent in their claims as to the amount in controversy. They cannot claim in one breath that nothing is involved, and in the next when it is to their advantage so to do, claim that more than $1,000 is involved. Of course appellee would be precluded from claiming that less than $1,000 is involved by the allegations of its bill, but no such claim is made. On the contrary we again assert that much more than $7,000 is involved. In view of the careful analysis of the situation in Judge Kenyon's opinion in the court below, further argument on this proposition seems unnecessary.

c. *Suit Prematurely Brought.*

As we understand appellant's claim it is that it was improper to restrain the board from proceeding with an assess-

ment until the hearing of August 1, 1921, because the board might have changed its mind and concluded not to levy any assessment on plaintiff's property at all. As indicated, however, the board had already passed a resolution apportioning the assessment. The only thing that the plaintiff could have done was to have asked the board to change its conclusion which it already arrived at.

Throughout appellants' lengthy brief it is vigorously insisted that the board had the right to levy an assessment on plaintiff's property. Nowhere is there a suggestion that it does not intend to levy an assessment as charged in the bill. It is therefore rather refreshing to have counsel claim that at this stage of the case the suit is premature until the board has determined whether it will in fact levy an assessment.

We charge in the bill that any assessment would be invalid and void because (1) the law was invalid, and (2) in any event the law did not permit any such assessment. The learned courts below upheld the latter contention. If *any assessment* which the board might make will be invalid, it can be enjoined at any stage of the proceedings. We complain not so much that the assessment made by the board's resolution was made upon an improper basis, *but that it was made at all.*

Since we charge that the board intends to levy an absolutely void assessment and the defendants admit at least inferentially that they expect so to do, claiming the right under the law to do so, such action on the part of the board may be properly restrained at any stage. This case is entirely different from the case of *Milheim v. Moffat, Tunnel Improvement District,* 262 U. S. 710. In that case the complaint was that the assessment made or to be made was on an improper basis, to-wit, an ad valorem basis, and the court merely held that an injunction would not lie until the final action by the board, upon the

theory that if the basis was erroneous it would probably be modified on hearing. Had it appeared that *they had no right to assess at all*, a different conclusion would have been reached.

III.

THE DRAINAGE DITCH STATUTE IS UNCONSTITUTIONAL IN THAT IT TAKES PROPERTY WITHOUT DUE PROCESS OF LAW, CONTRARY TO THE 14TH AMENDMENT OF THE FEDERAL CONSTITUTION.

There are a few things in regard to drainage ditches well established by the decisions which are essential to due process of law as applied to such special assessments. They are as follows:

1. The only basis for a special assessment is a special benefit and, therefore, the assessment cannot be greater than the benefit conferred upon the party assessed.

Norwood v. Baker, 172 U. S. 269.
Gast Reality Co. v. Snyder Granite Co., 240 U. S. 55.
Martin v. District of Columbia, 205 U. S. 135.

In *Norwood v. Baker* Mr. Justice Harlan stated:

> "The principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited and, therefore, the owners do not in fact pay anything in excess of what they receive by reason of such improvement."

The court further said:

> "In our judgment the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is to the extent of such excess a taking under the guise of taxation a private property for public use without compensation."

In *Gast Realty Company v. Snyder Granite Company* Mr. Justice Holmes said:

> "The Legislature may create taxing districts to meet the expense of local improvements and may fix the basis of taxation without encountering the 14th Amendment, unless its action is palpably arbitrary or a plain abuse. The front foot rule has been sanctioned for the cost of paving a street. In such a case it is not likely that the cost will exceed the benefit and the law does not attempt an imaginary exactness or go beyond the reasonable probabilities. * * * If the law is of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of one so taxed in fact."

From these decisions and many others the law is settled that a special assessment cannot exceed the benefit conferred upon a given tract of land and there must, therefore, be some tribunal which determines this fact and a hearing must be had for that purpose, unless the Legislature has itself determined that fact when it passed the law.

2. It is also well settled that where the Legislature has not determined what lands are benefitted and the amount of the benefit, but leaves it to some Board or Commission to determine what will be benefitted and what the amount of the benefit is to each, the inquiry is of a judicial nature and property owners are entitled to an opportunity to be heard upon due notice.

Road Improvement District No. 2 v. Missouri Pacific Ry. Co., 275 Fed. 600.

Turner v. Wade, 254 U. S. 64.

Central Railway of Georgia v. Wright, 207 U. S. 127.

Londoner v. City and County of Denver, 210 U. S. 373.

Fall Brook Irrigation District v. Bradley, 164 U. S. 112.

In the case of *Road Improvement District No. 2 v. Missouri Railway Company,* 8th Circuit, Judge Sanborn said:

> "But in the case in hand the Legislature did not undertake itself to make the assessment on the property in this district, but it delegated that power to and imposed that duty upon the Board of the district, and when the Legislature delegates to a Board or to Commissioners the determination of the question of what lands will be benefitted or what the amount of benefit to such lands will be the inquiry becomes in its nature judicial in such a sense that property owners are entitled to a hearing or an opportunity to be heard after notice before these questions are determined."

In the case of *Turner v. Wade,* Mr. Justice Day said:

> "In considering certain sections of the Georgia tax laws this court held in Central Railway Company v. Wright, 207 U. S. 127, 52 L. Ed. 134, that due process of law requires that after such notice as may be appropriate the tax payer have opportunity to be heard as to the validity of the tax and the amount thereof, by giving him the right to appear for that purpose at some stage of the proceedings. This case with others was cited with approval in Londoner v. Denver, 210 U. S. 373, 52 L. Ed. 1103, wherein we said that if the Legislature of a state instead of fixing the tax itself commits to the subordinate body the duty of determining where and in what amount and upon whom the tax shall be levied, due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed the tax payer must have the opportunity to be heard, of which he must have notice, whether personal, by publication or by some statute fixing the time and place of the hearing."

With these two general principles in mind let us examine the South Dakota Drainage Act. We contend that the South Dakota Act nowhere provides for any hearing upon the cost

of the drain or other improvement, the amount of the tax to be levied, what lands are benefited or whether the tax upon any particular piece of land exceeds the benefits to that piece of land and hence does not measure up to the standard of "due process of law" required by this court to be shown.

There are only two hearings provided for in the South Dakota Drainage Act. The first, under Section 8462, is the hearing upon the original petition. Upon that hearing the Board decides whether the proposed ditch is conducive to public health, convenience or welfare or is practicable for draining agricultural lands. The notice of this hearing does not describe any land except that through which the ditch passes. *In this particular case no property belonging to the Rock Island Railroad was described in that notice, nor was any notice given to the Railroad that its right of way and bridges were liable to be assessed to pay for the drainage ditch.* This hearing does not establish a drainage district as it does in Iowa where notice is served upon every tract of land that is to be included within the district. At this hearing the County Commissioners are not called upon to decide whether the benefits to the land will be greater than the cost of the ditch. The North Dakota statute contains such a provision and the Supreme Court sustained the constitutionality of that statute upon that theory.

Soliah v. Heskin, 222 U. S. 522.

We call the court's attention to the fact that at the time this hearing is had no survey has been made, no estimate of the cost of the ditch has been filed, no plans have been made, no contracts have been let and no one knows what the undertaking will cost. It is, therefore, impossible for the County Commissioners at the time of this first hearing to decide whether the *benefits received by the land sought to be taxed will be equal*

to or greater than the assessment. For the reasons pointed out this hearing certainly cannot be sufficient to comply with the rule which requires that a tax payer have an opportunity to be heard upon the amount of the tax and whether the assessment against him is greater than the benefit he has derived.

The second hearing is had under Section 8463. This hearing determines what lands are benefitted and fixes the proportion of benefits between the various lands. The statute states that the Board of County Commissioners shall fix the proportion of benefits of the proposed drainage among the lands affected and shall appoint a time and place for equalizing the same. At the hearing the Board fixes the proportion of benefits for each tract of land, taking any particular tract as a unit, and the benefit which any Railroad Company may obtain for its property by such construction shall be fixed and equalized together with the proportion of benefits to tracts of land.

The statute contemplates that this hearing for fixing the proportion of benefits shall be had before the ditch has been constructed and before anyone knows how much will be actually expended in its construction. The hearing may be put off until after the ditch has been built, but at this hearing the amount of tax which any party will have to pay is not determined and there is no opportunity to determine whether the assessment will be greater than the benefit received. The statute provides that if further expense is incurred, or if for any reason some of the parties assessed do not have to pay the tax, a new proportion of benefits shall be fixed and new assessments made. At this hearing the tax payer cannot raise the question that the proceedings have been illegal, that the money has been wrongfully expended, that the cost of the improvement has been greater than the benefits derived from it, or that the tax which he will be required to pay is in excess

of any benefit which his property will receive. *The only thing passed upon at this hearing is the equalizing of the benefits between the different tracts.* It is of no value to the Rock Island Railroad to have a right to see that its taxes are no greater than those assessed against the Milwaukee Railroad provided that both of them are in excess of the amount of the benefit received and are confiscatory of their property.

Therefore, we contend that this hearing does not comply with the due process of law required in such matters.

3. A third proposition which has been well established in drainage matters is that the method provided for determining the proportion of benefits and the tax to be levied against particular person must be reasonable and not arbitrary.

This was well stated in the case of *Kansas City Railway Company v. Road Improvement District No. 6, Arkansas*, 256 U. S. 658. The court said:

> "The settled general rule is that a state legislature may create taxing districts to meet the expense of local improvements and may fix the basis of taxation without encountering the 15th Amendment, unless its action is palpably arbitrary or plain abuse. * * * Ordinarily the levy may be upon lands specially benefitted according to value, position, area or the front foot rule. * * * If, however, the statute providing for the tax is of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of one so taxed in fact."

The court further said:

> "The statute under consideration prescribed no definite standard for determining benefits from proposed improvements. The assessors made estimates as to farm lands and

to town lots according to area and position and wholly without regard to their value, improvements thereon or their present or prospective uses. On the other hand disregarding both area and position they undertook to estimate benefits to the property of plaintiffs in error without disclosing any basis therefor, but apparently according to some vague speculation as to present worth and possible future increased receipts from freight and passengers which would inhance its value considered as a component part of the system."

The court held the Arkansas law unreasonable and unjust and not due process of law. We call the court's attention to the statute there passed upon. Section 11 of Act 338 of the Laws of 1915 of Arkansas provides the method of assessment as follows:

"The assessors shall assess the benefits to be received by the several and particular tracts of land, railroads, tram roads and other real property within the district by reason of the improvement. All lands embraced in said district shall be entered upon said book in convenient sub-divisions as surveyed by the United States and appear upon the assessment books in force at the time in said county in appropriate columns showing: (1) Name of the Owner. (2) Subdivision of the land. (3) Number of acres. (4) Present assessed value. (5) Assessed benefits per acre. (6) Assessed benefits to each tract. And if it be a railroad or tram road the name of the owner thereof, the supposed mileage in said district, the present assessed value of said railroad and other property belonging to said company, and the amount of assessed benefits per mile and the total amount of benefits assessed against said railroad or tram road."

Under the Arkansas statute above quoted they apparently did the same thing that they have done under the South Dakota statute. They compared tracts of land according to acreage

and value and determined thereby the benefit to each tract, but when they came to a railroad they had no method of comparison but simply assessed what they though fit against the railroad without any basis of comparison. This sort of an assessment the Supreme Court held to be arbitrary and unreasonable.

Will the Court please note the statute on the equalization of benefits, (Section 8463). The first part of the section states:

> "The Board of County Commissioners shall fix the proportion of the proposed drainage among the lands affected and shall appoint a time and place for equalizing the same."

This does not provide for the equalizing of benefits between the lands effected and between a railroad bridge or a railroad right of way, and there is nothing in the section which authorizes the County Commissioners to fix a proportion of benefits between a tract of land and a railroad company.

The part of the section in regard to notice provides for notice of such equalization of proportion of benefits to be given as therein designated. Since there is no proportion of benefits between the land and a railroad company's property, there is no notice provided for the railroad company and the notice served in this case that a day had been set for equalizing the proportion of benefits between a tract of land and the railroad right of way or railroad bridge is without any authority in the statute.

It will be noted that this section provides what the notice shall contain. It says:

> "Such notice shall state the description of each tract of land effected by the proposed drainage and the names of the owners thereof, as appears from the tax records in the County Treasurer's office, and the proportion of benefits

fixed for each tract of property, taking any particular tract as a unit, and shall notify all such owners to show cause why the proportion of benefits shall not be fixed as stated."

This clearly does not contemplate the giving of notice to a railroad company that any proportion of benefits has been fixed against the company's right of way or its bridges, because the railroad property is not a tract of land and is not included in the proportion of benefits fixed upon tracts of land.

The statute then says:

"And the benefits which any railroad company, or other corporation or property owner, may obtain for its property by such construction shall be fixed and equalized together with the proportion of benefits to tracts of land."

This clearly draws a distinction between the method of fixing the proportion of benefits upon tracts of land and the method for fixing the benefit to a railroad company. There is in this section no provision for the fixing of a proportion of benefits between a tract of land and a railroad right of way and railroad bridges, such as has been attempted in this case. The statute clearly says that tracts of land be treated in one way by fixing the proportion of benefits between the different tracts, taking any particular tract as a unit, but the property of a railroad company shall be treated in an entirely different manner by arbitrarily assessing against the railroad company an amount of benefits which the County Commissioners may decide in their own judgment should be assessed against the railroad, without in any way comparing it with the assessment made against tracts of land. This we say is an entirely arbitrary assessment, is unreasonable and is not based upon any method of comparison which it can be assumed with result in justice to the parties taxed.

This brings the attempted assessment in this case under the South Dakota Statute clearly within the case of the *Kansas City Southern Railway Company v. Road Improvement District No. 6*, decided under the Arkansas law above cited. In that case the court said:

> "Obviously the railroad companies have not been treated like individual owners, and we think the discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law.

In the case at bar the engineer for the County Commissioners has worked out an elaborate and ingenius scheme for determining the amount of benefit which a railroad company has received. It is, however, a scheme not contemplated by the statute and does not treat the railroad company the same as a private land owner is treated, for instance; he says that there are only about twelve acres of land belonging to the Rock Island which are considered in any way benefitted by the drainage ditch. This twelve acres is the mile of track between the city limits and the bridge southwest of town. If this was treated the same as the agricultural land the assessment against it would be about One Hundred Twenty Dollars ($120), but the assessment levied here against the Rock Island property is about Eight Thousand Dollars ($8,000).

So far as the method of assessment is concerned the statute might be held to be constitutional as to agricultural lands and at the same time be unconstitutional as to railroads as was said in *Gast Realty Company v. Schneider Granite Company*, 240 U. S. 55:

> "If the law is of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of one so taxed in fact."

We contend that the evidence in this case shows from the manner in which the statute is sought to be applied to a railroad company that there is no reasonable presumption that substantial justice will be done under this statute. After all the elaborate calculation made by the engineer of the County Commissioners as to benefits to a railroad company the assessment to be levied against the company is purely a guess, speculative and arbitrary and the act itself provides no method of determining the amount of the tax or of equalizing it with the tax against agricultural land.

To re-state the proposition, the legislature has left it to the County Commissioners to determine what lands are benefited and what the amount of assessment against each shall be. The proceedings are of a judicial nature and the Rock Island Railroad must be brought within the jurisdiction of the Board of County Commissioners in some manner. No drainage district is formed. No notice of the hearing for establishing the ditch is served in any manner upon the Rock Island Railroad. Without notifying the railroad that its property is to be included within the property benefited or that it is in any way interested in the construction of the drainage ditch the County Commissioners go ahead, build the ditch and spend the money. Then after everything is done and complete they make a proposed assessment against the property of the railroad company and serve notice upon the company that it is supposed to be benefited by the building of the ditch and that an assessment has been made against it and ordered to show cause why this assessment should not become conclusive. At this hearing the only question that is to be determined is the proportion of benefits among the different parties assessed. This we claim does not constitute due process of law and does not furnish the railroad company with a reasonable notice and a legal hearing before taking its property.

IV.

THE DITCH PROCEEDINGS HAD SINCE 1916 ARE ASSESSMENTS FOR MAINTENANCE UNDER SECTION 8470 OF THE CODE, AND THE ATTEMPT TO ESTABLISH "DRAINAGE DITCH NO. 1 AND 2" WAS A SUBTERFUGE IN ORDER TO INCLUDE NEW TERRITORY TO HELP PAY FOR THE MAINTENANCE OF THE OLD DITCHES.

Section 8470 of the Code is as follows:

> "Assessments for Maintenance. For the cleaning and maintenance of any drainage established under the provisions of this article, assessments may be made upon the land owners effected in the proportions detremined for such drainage at any time upon the petition of any person setting forth the necessity thereof, and after due inspection by the Board of County Commissioners." (See appendix.)

The so called Drainage Ditch No. 1 and 2 is not a new ditch and not a new enterprise. It is simply the two old ditches cleaned out, embankments raised, a new spillway put in to handle the water and controlling gates placed at the head of the new ditches.

The parties responsible for the building of Drainage Ditches No. 1 and No. 2 were responsible for what they did with the water that they had diverted from the Sioux River. They could not bring this water out of the Sioux River and carry it down to the hill above the City of Sioux Falls and turn it loose. Having brought the water out of its natural water course they must take care of it. The first spillway washed out. The ditch filled up. A new spillway had to be built and the ditch had to be cleaned out. The expense of the maintenance, however, under the statute and under the laws would have to be paid by the parties responsible for the building of

the ditch. Under the statute the new assessment for the cost of maintenance is levied upon the lands which were found benefited in the original ditch proceedings, and in the same proportion as the lands were originally benefited. Under this statute the Rock Island Railroad is not liable for the cleaning out of the ditch or the building of the spillway or any other repairs placed upon the ditch.

There is no provision in this statute for taking any other lands to assist in the maintaining of a ditch after it has been construed and the benefits for its building assessed.

In 1916 a petition was filed to have Drainage Ditches No. 1 and 2 repaired and to build a new outlet through Covells' Lake down to the Big Sioux River west of the city. Defendant's Exhibit 42 (page 228) is the resolution of the Board establishing a drainage ditch as an extension to the outlet of Drainage Ditch No. 1 and for the repair of Drainage Ditch No. 1 and 2. This project was later abandoned and a new petition was filed for the building of a new spillway, the cleaning out of the old ditch, the building of controlling gates and straightening of the river. This project was not the construction of a new ditch, but was the required improvement and maintenance of the old ditch, and the filing of a new petition and the attempt to take any new territory as if it were a new project is purely a subterfuge and both courts below have so found.

Section 8489 in regard to invalid and abandoned proceedings cannot be applied to what was done by the County Commissioners in this case. That section applies to proceedings where a drainage ditch has been enjoined, vacated, set aside, declared void, dismissed or voluntarily abandoned, and provides for the re-establishment of a ditch over the same territory, and that the new ditch shall assume the expense of the old ditch and give credit for any payment made upon the old ditch by

people benefited thereby. No such proceeding was had in this case. The old proceedings establishing Drainage Ditches No. 1 and No. 2 have never been held void, set aside or abandoned. They are in full force today. The assessments have been levied, the land benefited, determined and the assessments have been paid.

It is, therefore, the contention of the appellee that what was done under the proceedings of 1916 to Drainage Ditch No. 1 and Drainage Ditch No. 2 was in the nature of repair and maintenance and under the statute could be assessed only against the lands originally found to be benefited by the old ditches, to-wit: the old assessment district, and in the same proportion.

In this case the court below specifically found that the establishment of "drainage ditch No. 1 and 2" was a mere evasion and subterfuge to avoid the effect of the law of South Dakota, that for maintenance and repair of an existing ditch only the lands within the original district can be assessed, and that the work done was only a repair of the old ditches.

Such finding is amply and overwhelmingly supported by the evidence, and this court will not be behind the determination of the lower court. Road Improvement Dist. No. 2 v. Missouri Pac., 275 Fed. 600. Nothing could be added to the opinions of the trial court and the circuit court of appeals as to their reasons for arriving at this conclusion (R. 93 to 96; 255-257).

It is, however, asserted and re-asserted in appellant's brief that the case of *Gilseth v. Risty*, 193 N. W. 132, by the Supreme Court of South Dakota, reached a conclusion contrary to that of the Circuit Court of Appeals as to the construction of the South Dakota Drainage Statute. That the Gilseth case dealt with this same "drainage ditch No. 1 and 2" is true; but that there is anything in it in conflict with Judge Elliott's or with Judge Kenyon's decision, we deny.

To refresh the Court's recollection as to the meaning of the terms employed in this brief, as we have already indicated, the term "old asesssment district" means the property originally assessed for Drainage Ditch No. 1 and Drainage Ditch No. 2. The term "new assessment district" means the additional property attempted to be assessed for "Drainage Ditch No. 1 and 2".

This case at bar involves the right to assess property in the *new* assessment district, both Courts below holding that such property could not be assessed because the new project so-called, was a repair of the old ditches, assessments for which were by statute limited to the old assessment district.

On the other hand, Gilseth was the owner of property in the *old* district, and participated actively in the establishment of this new subterfuge ditch. Although one of the prime movers, when it came to paying his assessment, he attempted to avoid liability. He contested the assessment upon the ground that the Board was without juirsdiction because there were irregularities in the proceedings (this is not involved in our case) and because the establishment of this ditch was a repair only of the old ditch. The Supreme Court of South Dakota, after being careful to say "plaintiff in this action is the owner of agricultural land within the drainage area of drainage district No. 2", (the *old* assessment district), said in effect:

(1) That the fact that the new project might be a repair of the old ditch made no difference because the law "gives the board the same authority to repair an old ditch as it does to construct a new one." Therefore, as, under Section 8470, the Board was authorized to assess property in the old assessment district for repairs, and as Gilseth's property lay in the old district the Board had jurisdiction to levy the assessment.

The attempted assessment of property in the new assessment district was not involved.

(2) But (and this is clearly the reason for the decision the reference to the repair proposition being clearly by way of argument only) Gilseth was estopped by his conduct from contesting his assessment.

Will the Court please note the last portion of the South Dakota Supreme Court's opinion:

> "Appellant having stood by and seen all the work performed without protest and having received all the benefits that can result therefrom, should not now be permitted to escape payment for the same. The relief asked by appellant is equitable in its nature, but because of circumstances above shown, all the equities of the case are against appellant and in favor of the Board."

Taking the view of the Gilseth case most favorable to appellants, and eliminating entirely the question of estoppel, although we assert that the South Dakota Supreme Court did decide the case on the ground of estoppel solely, the most that could be claimed from its decision is that the *court held that land WITHIN the old district COULD be assessed for Ditch 1 and 2. The Circuit Court of Appeals held that land WITHOUT the old district COULD NOT be assessed for Ditch 1 and 2.*

The Gilseth case neither decides nor intimates anything contrary to the decision of the Circuit Court of Appeals as to the construction of the Drainage Statute.

V.

THE ASSESSMENT OF PLAINTIFF'S PROPERTY CONSTITUTES A DISCRIMINATION SO PALPABLE AND ARBITRARY AS TO AMOUNT TO A DENIAL OF THE EQUAL PROTECTION OF THE LAW.

Exhibit A (p. 175) is a map of the Rock Island tracks and right of way in the City of Sioux Falls. The acreage is slightly less than thirty acres. None of it is agricultural lands. It is all used for railroad purposes only. Its tracks are located from eight to fifteen feet above the average water of the Sioux River. (See testimony of B. F. Wait, pp. 174-180; Dean, at 180-182; Burkes, 182; Pilcher, 182-183.) As already indicated, the County Engineer estimated that the property of the Rock Island benefited by this ditch amounted to 12⅛ acres, (page 241) upon which were located one mile of track and two bridges. Assessing the Rock Island property upon the same basis as agricultural lands would put the assessment at about twelve units, or a little less than $120. Because, apparently there was a railroad track and two bridges upon this property, the property was actually assessed 839.45 units, or about $8,000. Therefore, the railway track and two bridges are assessed 827 units, or considerably over $7,000, in spite of the fact that the evidence conclusively shows that the water of the Sioux River at its highest point had never reached the track. Since the only possible theory upon which a benefit could accrue to the Rock Island track is that the ditch prevented overflow, it is apparent how arbitrary and discriminatory such assessment is as compared with the assessment against the lands of others. The case clearly falls within the rule announced in *Thomas v. Kansas City Southern Railway Co.*, 277 Fed. 708, where this court said:

> "Where a railroad in a drainage district comprising 12,000 acres owned only 40.43 acres and 3.61 miles of track along the extreme west and northwest boundaries, constructed mostly on high hills and a trestle above overflow, an assessment of one-half of the cost of the improvement which would increase land values at least $250,000 was so palpably discriminatory and arbitrary as to deny equal protection of the laws."

This case was affirmed in *Thomas v. Kansas City So. Ry.*, 261 U. S. 481.

No better argument could be made upon this proposition than that contained in the court's opinion (pp. 97-100 of the Record).

VI.

Estoppel.

Under this head appellant asserts that because the Railway Company's agent knew that the spillway was being rebuilt and the old ditches repaired the Railway Company is estopped to claim that the statute under which the county assumed to do this is repugnant to the Fourteenth Amendment, or that the Board had, under the law, no jurisdiction to assess its property. No such novel proposition has, in our experience, ever been asserted in any court. It is too elementary to require the citation of authorities that in order to constitute an estoppel the party against whom the estoppel operates must have done or omitted to do some act and that relying upon such act or omission the other party has changed his position to his detriment. When Mr. Pilcher, the company's agent, saw the spillway being rebuilt, the only thing possible would have been to go through the form of notifying the county authorities that the Railway Company claimed it was not benefited. This was,

however, the time when no one had ever asserted that it was so liable. The Railway Company was not required to take any action against an assessment under an unconstitutional statute or an unauthorized assumption of jurisdiction by the Board until such time as it is actually threatened with an assessment. This was not until June, 1921, when the Railway Company was for the first time notified that it was claimed that its properties were benefited. Promptly upon receipt of this notice it commenced this action. Under the circumstances we do not feel justified in consuming time by arguing the proposition that the company has not lost its constitutional rights because it saw the spillway being constructed. Neither court below had any difficulty with the proposition.

For the foregoing reasons, the decree appealed from was correct and should be affirmed, or the appeal dismissed.

Respectfully submitted,

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Counsel for Appellee.

APPENDIX.

Sec. 8470. ASSESSMENTS FOR MAINTENANCE. For the cleaning and maintenance of any drainage established under the provisions of this article, assessments may be made upon the landowners affected in the proportions determined for such drainage at any time upon the petition of any person setting forth the necessity thereof, and after due inspection by the board of county commissioners. Such assessments shall be made as other assessments for the construction of drainage, certificates may be issued thereon and such assessments and certificates shall be liens, interest-bearing, perpetual and enforcible, in all respects as original assessments and may be sold at not less than par by the board of county commissioners, turned over to persons contracting for such cleaning and maintenance, or may be collected directly by the board of county commissioners.

IN THE
Supreme Court of the United States
October Term 1925

No. 96.

A. G. RISTY *et al*, as County Commissioners, etc., *et al.*,
Appellants,

vs

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY
Appellee

BRIEF AND ARGUMENT FOR APPELLEE

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Appellee

APPEAL FROM THE CIRCUIT COURT OF APPEALS OF THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR APPELLEE

The Chicago, Milwaukee & St. Paul Railway Company, Plaintiff and Appellee, filed its bill in the District Court of the District of South Dakota praying for an injunction. From a decree granting an injunction the Defendants and Appellants appealed to the Circuit Court of Appeals of the Eighth Circuit, in which latter court the decree of the District Court was affirmed. From the decision of the Circuit Court of Appeals the defendants appeal to this Court.

This suit involves the constitutionality of the Drainage Ditch Statute of the state of South Dakota under both the federal and state constitutions and also involves the regularity and validity of proceedings taken under that statute. The facts out of which this suit arises, are, as follows:

STATEMENT OF FACTS

At the election in November, 1906, there was adopted an amendment to the constitution of South Dakota which is known as Section 6 of Article XXI of that constitution and which is as follows:

"§ 6. The drainage of agricultural lands is hereby "declared to be a public purpose and the legislature may "provide therefor, and may provide for the organization "of drainage districts for the drainage of lands for any "public use, and may vest the corporate authorities there- "of, and the corporate authorities of counties, townships "and municipalities, with power to construct levees, drains "and ditches, and to keep in repair all drains, ditches and "levees heretofore constructed under the laws of this "state, by special assessments upon the property bene- "fited thereby, according to benefits received."

The legislature of South Dakota has never enacted any law to carry into effect the powers, conferred upon it by the foregoing constitutional amendment providing for the organization of drainage districts, but has enacted, or attempted to enact various laws vesting the corporate authorities of the several counties of the state with power to construct levees, drains, and ditches and to keep the same in repair by special assessments upon the property benefited thereby.

The first drainage ditch enactment was Chapter 98 of the Session Laws of South Dakota, 1905, which was passed prior to the adoption of Section 6 of Article XXI of the South Dakota constitution. After the adoption of that section a new law was passed which is known as Chapter 134 of the Session Laws of South Dakota, 1907. The 1907 law was amended by Chapter 102 of the Session Laws of South Dakota, 1909. The 1907 law was further amended by Chapters 207 and 208 of the Session Laws of South Dakota, 1917. In 1919 the entire drainage law was recompiled and re-enacted as Sections 8458 to 8507, South Dakota Revised Code of 1919. Further amendments were enacted in 1919 which appear as Chapter 46 of the Session Laws of the First Special Session of the Sixteenth Legislature of South Dakota and by Chapters 193, 194, 195, 196, 197 and 198 of the Session Laws of South Dakota, 1921.

For the convenience of the court we are printing as Appendix A of this brief the portions of the South Dakota constitution, and as Appendix B the portions of the South Dakota laws which bear upon the questions at issue in this suit.

The Big Sioux river has its origin in a lake in the northeastern part of South Dakota and runs thence in a generally southerly direction, and in the eastern part of South Dakota, (of which state it is in places the boundary line) for about 100 miles and empties into the Missouri river at a point a short distance north of Sioux City, Iowa. In its course the Big Sioux river passes through the center of the city of Sioux Falls. It strikes Minnehaha county, in which Sioux Falls is situated, at its north line and flows in a generally southerly direction, but with many bends and curves, for a distance, in a straight line, of twenty-four miles, running in its course two and one-half miles west of the business center of the city of Sioux Falls and south to a point three miles south of the business center. It then flows in an easterly direction for about three miles and then turns north, running through the business center of the city of Sioux Falls and northerly to a point two miles from the business center. It then runs in an easterly direction for several miles when it again resumes its southerly course towards its junction with the Missouri river. The consequence is that at the city of Sioux Falls the river runs like an inverted letter "S," upon the bar of which Sioux Falls is situated.

From a point about five miles south of where the Big Sioux enters Minnehaha county it runs through a valley or flat from two to four miles in width until it reaches a point about three miles southwest of the business center of the city of Sioux Falls. From there on until it reaches the northeastern portion of the city the river is confined by high banks on either side and with no valley interposing between them.

There is comparatively little fall between the point where the Big Sioux river enters the flat about fifteen miles north of the city of Sioux Falls and the northeastern section of the city where the river passes over a series of falls of an aggregate height of more than one hundred feet. The result is that the level of the river bed, as it

passes over the falls in the northeastern portion of the city of Sioux Falls, is over one hundred feet below the level of the river at a point, four miles to the westward, where it passes to the west of the city of Sioux Falls.

About 1878, a dam was constructed for water power purposes across the Big Sioux river within the limits of the city of Sioux Falls a short distance above the falls and, between that dam and the falls, other dams were subsequently constructed, all of which were in existence long prior to any of the transactions out of which this suit arises. These dams for many years have been utilized, without complaint from any source, by the Northern States Power Company and its predecessors, as a source of water power, and upon the dams and power works several hundreds of thousands of dollars have been expended with the consent, express or implied, of the public authorities of Minnehaha county and of the city of Sioux Falls and of the property owners along the Big Sioux river.

The city of Sioux Falls, something over twenty years ago, located its municipal waterworks upon the flat north of the city, between the Big Sioux river where it flows in a southerly direction to the westward of the city and where it flows to the northward after it passes over the falls in the northeastern portion of the city. The flat where the waterworks are situated is a few feet higher than the level of the river bed to the westward of the waterworks plant and more than one hundred feet higher than the level of the river bed to the eastward. Between the two channels of the river (at this point about 3½ miles apart) there is an extensive gravel bed underlying the surface of the ground, which gravel bed is filled with water and is the source from which the city of Sioux Falls obtains its municipal water supply.

For many years, and from in fact shortly after the settlement of Minnehaha county in the late sixties and early seventies, complaints arose in regard to the flooding of the land in the valley of the Big Sioux river north of the city of Sioux Falls. The topography of the country along this valley being level and there being but little fall in the river bed for a distance of nearly thirty miles, between the north end of the flats and the falls of the Big

Sioux river, the surface waters, in times of freshets, would accumulate upon the flats and remain there for several days, and sometimes for weeks, before they gradually flowed off through the narrow river channel south of the city of Sioux Falls and through the city until they reached the falls. This situation was made still worse by the construction of the dam upon the river above the falls in 1878 which hindered still further the passage of the water along the river bed before it reached the falls. As the state of South Dakota became more and more densely settled in the counties along the Big Sioux river north of Minnehaha county, numerous drainage ditches were established, the effect of which was still further to accelerate the flow of surface water during freshets and to cause a still greater volume of water to accumulate upon the flats north of the city of Sioux Falls.

In December, 1907, the Board of County Commissioners of Minnehaha county, purporting to act under the authority of Chapter 134 Session Laws of South Dakota, 1907, established a drainage ditch known as Drainage Ditch No. 1. This ditch was some three miles in length and extended, from a point on the Big Sioux river below the falls, northward to a point on the flat north of the city of Sioux Falls. In 1910, the Board of County Commissioners, again purporting to be acting under the authority of Chapter 134 of the Session Laws of South Dakota, 1907, as amended by Chapter 102, Session Laws of South Dakota, 1909, established a second ditch, known as Drainage Ditch No. 2, which commenced at the north end of Drainage Ditch No. 1 and extended in a northerly direction for about twelve miles.

At the point Drainage Ditch No. 1 empties into the Big Sioux river below the falls it passed over a hill in a descent of about one hundred feet. The bottom of the ditch was covered along this descent with concrete, making a spillway through which the water accumulating upon the flats could run to reach the channel of the Big Sioux river below the falls.

Drainage Ditch No. 1 and Drainage Ditch No. 2 operated more or less successfully in draining the flats until the spring of 1916 at which time, during a somewhat heavy rainfall, the concrete bottom of Drainage Ditch No.

1, (or its spillway) washed out and the water began cutting a channel through the hill.

The fact that the concrete spillway had washed out did not in any manner decrease the efficiency of Drainage Ditch No. 1 and Drainage Ditch No. 2 as drainage propositions. In fact, the washout of the spillway made them still more efficient for draining purposes, and if they had been left alone they would very speedily have settled the question of drainage for the lands upon the flats. The effect of the washout was to open a passage for all of the water which accumulated upon the flats into the channel of the Big Sioux river below the falls and this channel was amply sufficient to have taken care of all of the water which ever accumulated upon the flats. In fact, it was a perfect success as a drainage proposition.

Unfortunately, while Drainage Ditch No. 1, after its spillway was washed out, succeeded in doing all in the way of drainage that the owners of the lands upon the flats desired to have done, it seriously affected other interests. If the water had been allowed to go without hindrance through the new channel it would, within a very short time, have diverted the entire course of the water in the Big Sioux river and would have formed a new channel for the river across the flats north of the city of Sioux Falls, in which channel all of the water coming down the river could have flowed into the channel below the falls without passing around and through the city of Sioux Falls and over the falls, thus cutting off about twelve miles of the river channel. The further effect would have been to destroy the waterpower formed by the dams across the Big Sioux river in the city of Sioux Falls above the falls, as the only water which would have flowed in the Big Sioux river channel through the city of Sioux Falls and over the falls would have been the water from Skunk creek, a tributary of the Big Sioux river, emptying into that stream south of the city of Sioux Falls. Another effect of allowing the river to run through its new channel would have been to destroy the municipal water plant of the city of Sioux Falls by draining the water from the gravel bed from which the city obtained its water supply.

After the spillway at the outlet of Drainage Ditch No. 1 had washed out in March, 1916, various plans were

proposed looking toward the control of the water which flowed through the ditch. Many conferences were had between the Board of County Commissioners and the representatives of the various interests affected. The Appellee was not represented at any of these conferences and never took any part in any manner in them or in the subsequent proceedings.

In October, 1916, the Board of County Commissioners took proceedings by which they attempted to establish a new ditch project which they named "Drainage Ditch No. 1 and 2." Thereafter, all proceedings with respect to Drainage Ditch No. 1 and with respect to Drainage Ditch No. 2 were abandoned and all subsequent work was done by the Board of County Commissioners upon the new project, "Drainage Ditch No. 1 and 2."

The Board of County Commissioners, after attempting to organize Drainage Ditch No. 1 and 2, proceeded to construct additional ditches, cut-offs, and dams in the flats above the city of Sioux Falls, and at the former outlet of Drainage Ditch No. 1, to construct a spillway, and other water retaining works for the purpose of controlling the flow of the water through the ditches. This work was done by the Board of County Commissioners without any regard to the requirements of the South Dakota drainage statutes and without having first had plans therefore prepared and approved by the state engineer. The most of the work was done by the board without letting a contract therefor and upon the cost-plus plan. The result was, that at the end of the construction period, the cost of the work done by the Board of County Commissioners upon Drainage Ditch No. 1 and 2 had amounted to a sum in excess of $250,000, of which upwards of $150,000 was expended upon the spillway and other water retaining works at the outlet of the ditch. For the amount expended, the Board of County Commissioners issued warrants upon the Drainage Ditch No. 1 and 2. These warrants were taken by the laborers and material men employed upon the construction work and were in most instances discounted to the local banks in Minnehaha county.

After a number of abortive attempts to levy an assessment for the purpose of raising the money to pay the warrants issued for the work done upon Drainage Ditch No.

1 and 2, the Board of County Commissioners, in June, 1921, adopted a notice of time and place for equalizing the proportion of benefits for the construction of the work on Drainage Ditch No. 1 and 2, in which notice the proportion of benefits assessed against Appellee was 1681 units out of a proposed total of 32549.62 units, upon the basis of which proportion the assessment against Appellee and its property would be in excess of $15,000.

The plaintiff and Appellee brought this suit to enjoin the making of any assessment upon its property for the work done upon Drainage Ditch No. 1 and 2. A temporary injunction was granted *pendente lite*. The defendants named in the bill were the Board of County Commissioners of Minnehaha County, the Auditor, and the Treasurer of that county. Subsequently, the various banks and other persons holding drainage ditch warrants filed a petition for leave to intervene in the suit. This petition was granted and answers were filed both by the defendants and by the intervenors. Upon the hearing of the suit upon its merits, a final decree was entered enjoining the Board of County Commissioners from making any assessment for the expense of the work done under the proceedings establishing Drainage Ditch No. 1 and 2. The decree by its terms was without prejudice to the right of Appellee to contest any assessment upon the property owned by it which had formerly been assessed for Drainage Ditch No. 1 and Drainage Ditch No. 2. (*Chicago, Rock Island & Pacific Railway Company vs Risty,* 282 Fed. 364.)

In its bill Appellee set up the facts concerning the construction of Drainage Ditches No. 1 and No. 2 and the subsequent construction of a spillway and attacked the constitutionality of the South Dakota Drainage Statute in the following allegations:

"That said purported statute of the state of South "Dakota 'Exhibit A' hereto, is unconstitutional and void, "in that the same is in violation of Section 2 of Article "VI, of the Constitution of the State of South Dakota, "and in that the same is in violation of the Fourteenth "Amendment of the Constitution of the United States; "that said Statute, 'Exhibit A', is further void and un- "constitutional in that the same provides no fixed and

"determinable method or rule for the apportionment of "benefits upon the property and property owners situat- "ed within the drainage area, and especially in that said "purported statute furnishes no fixed or determinable "basis for the apportionment of benefits upon the prop- "erty of railroad companies and other corporations, and "upon the property of municipal and quasi-municipal cor- "porations, and upon platted property in cities and vil- "lages. Said purported law, 'Exhibit A', is further un- "constitutional and void in that the same provides for an "assessment against property without the right of the "property owner to be heard thereon and without notice "of any character to the property owner; that if said ap- "portionment of benefits be made as threatened by the "said Board of County Commissioners of said Minnehaha "County, and as is provided in said notice, 'Exhibit C', "the same will constitute the taking of the property of "plaintiff and of the other property owner affected by "said notice without due process of law; that a cloud will "be placed upon the title of the plaintiff to its real prop- "erty situated within said drainage area affected by "said notice, 'Exhibit C' and that there will result a mul- "tiplicity of suits and that plaintiff and other property "owners affected will suffer irreparable injury." (Rec- ord, p. 15).

The bill also attacked the acts of the Board of County Commissioners of Minnehaha County in its proceedings relative to the construction of the spillway and other drainage works as being without jurisdiction on account of the unconstitutionality of the South Dakota Drainage Statute and also on account of such proceedings not being had in accordance with the provisions of the Statute. (Record, pp. 14-15). The apportionment of benefits made against the property of Appellee was further attacked as exorbitant, disproportionate to the assessment of other property and made upon an arbitrary and discriminatory basis. (Record, pp. 72-73).

In their answer, Appellants took issue upon the un- constitutionality of the South Dakota Drainage law and specifically set up the establishment by the Board of County Commissioners of a new ditch project under the title of "Drainage Ditch No. 1 and 2."

Upon the trial in the district court the issues involved were, under the pleadings:

1. The constitutionality of the South Dakota Drainage Ditch Statute.

2. The regularity of the proceedings of the Board of County Commissioners of Minnehaha county under the Statute.

3. The proper construction to be given to the provisions of the South Dakota Drainage Statute.

There was practically no dispute as to the facts out of which this suit arises. It was admitted by all parties to the controversy that originally the Board of County Commissioners of Minnehaha county had established two drainage ditches known respectively as Drainage Ditch No. 1 and Drainage Ditch No. 2. It was also conceded that after the spillway, at the outlet of Drainage Ditch No. 1, had been washed out, the Board of County Commissioners established a new ditch project known as Drainage Ditch No. 1 and 2.

This suit was one of six cases involving this same ditch project, but the positions taken by the plaintiffs in the various cases differed upon the proposition as to whether Drainage Ditch No. 1 and 2 was a new and independent proposition or whether it was merely a project for the maintenance and repair of Drainage Ditch No. 1 and Drainage Ditch No. 2 and consequently a continuation of those two propositions. In all of the six cases the contention of counsel for Appellants was that Drainage Ditch No. 1 and 2 was a new and independent proposition. This position was contested by plaintiffs in some of the cases who took the position that it was merely a maintenance and repair project. In the case at bar, the plaintiff (Appellee in this court) was content to coincide with the position taken by the defendants (Appellants in this court) and to base its right to an injunction upon a state of facts in which it conceded that Drainage Ditch No. 1 and 2 was a new and independent ditch proposition and not a continuation of the old Drainage Ditch No. 1 and Drainage Ditch No. 2.

In the District Court injunctions were granted to the plaintiffs in all the six cases, but in his opinion filed in the District Court, the District Judge took the position that

Drainage Ditch No. 1 and 2 was merely a maintenance and repair project and a continuation of Drainage Ditch No. 1 and Drainage Ditch No. 2. (*Chicago, Rock Island & Pacific Railway Company vs Risty,* 282 Fed. 364).

While we contend in this court, as we did in the Circuit Court of Appeals, that the decree of the District Court was properly entered and should be affirmed, we do not act as the defenders of the decree upon the grounds upon which it was based by the District Judge. The decree was, in our view of the controversy, properly entered, but the same decree should have been entered had the court been of the opinion that Drainage Ditch No. 1 and 2 was an independent and original ditch proposition and not a continuation and repair project of Drainage Ditch No. 1 and Drainage Ditch No. 2. In this position we do not coincide with the views expressed by counsel for the Appellees in other of the six cases now before this court. We accept the position of counsel for the Appellants that Drainage Ditch No. 1 and 2 was an original and independent ditch proposition and upon that basis shall proceed with our argument in support of the decree of the District Court and the decision of the Circuit Court of Appeals.

An appeal was taken by the defendants and by the intervenors to the Circuit Court of Appeals for the Eighth Circuit, in which court the decree of the District Court was affirmed. *Risty vs Chicago, Rock Island & Pacific Railway Company,* 297 Fed 710. The defendants and intervenors then filed a petition in this Court for a writ of certiorari and, at the same time, took this appeal. The application for a certiorari was denied. *Risty vs Chicago, Milwaukee & St. Paul Railway Company,* 266 U. S. 622. The case is now before this court upon the appeal.

The foregoing being the facts in this suit, we submit on behalf of the Appellee, the Chicago, Milwaukee & St. Paul Railway Company, the following:

BRIEF AND ARGUMENT

I.

THE SOUTH DAKOTA DRAINAGE LAW IS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND IS THEREFORE UNCONSTITUTIONAL.

The first proposition which we desire to present for the consideration of the Court is that the entire South Dakota drainage law is unconstitutional, our contention being that it is in violation of the "due process of law" clause of the fourteenth amendment to the federal constitution. The consideration of this question involves an analysis of the provisions of the South Dakota drainage statute as it existed at the time the Board of County Commissioners of Minnehaha county attempted to establish Drainage Ditch No. 1 and 2 and did the work thereunder.

The first statutory step in the establishment of a drainage ditch is the filing of a petition. (§2, ch. 134, Laws of 1907; §8459, R. S. 1919). This petition must "set forth "the necessity for the drainage, a description of the pro- "posed route by its initial and terminal points and its "general course, or by its exact course in whole or in part, "and a *general statement of the territory likely to be "affected thereby*". It will be noticed that in the petition, which is the initial and jurisdictional step in the formation of a drainage ditch, it is not necessary to include a description of the property which will be affected and upon which assessments will be levied to pay the costs of the construction of the ditch. All that is required is a "general statement of the territory likely to be affected "thereby." The next step in the proceeding is for the County Auditor to transmit a copy of the petition to the State Engineer, who, together with the Board of County Commissioners is required to inspect the proposed route and "if in the opinion of the Board and the State Engi- "neer it is necessary," the Board of County Commissioners causes a survey of the proposed drainage to be made by a competent engineer, selected by the Board, but under the general supervision of the State Engineer. This survey is primarily for the purpose of aiding the Board in determining the necessity for the proposed drainage but

it may be a complete survey such as will be required for the construction of the drainage and the assessment of its cost. All this is within the jurisdiction of the Board of County Commissioners. The survey may extend to other lands than those affected by the proposed drainage for the purpose of determining the best practical method of draining the entire section of country of which the lands proposed to be drained, or a portion of them, are a part. (§ 3, ch. 134, Laws of 1907; § 1, ch. 102, Laws of 1909; §8460, R. S., 1919). While the survey may, at the option of the Board of County Commissioners, be a complete survey for the purpose of ascertaining all facts required for the construction of the proposed drainage and the assessment of its cost, such complete survey is not rendered obligatory by the statute and the Board of County Commissioners may have made only so much of the survey as may be necessary to determine the necessity for the proposed drainage.

After receiving the report of the surveyor, the Board of County Commissioners is required to determine the "exact line and width of the ditch, if the same shall not "be fixed in the petition, and shall file its determination "with the petition." The Board then fixes the time and place for the hearing of the petition and gives notice by publication in a newspaper for two weeks and by posting copies of the notice in three public places near the route of the proposed drainage. The notice "shall describe the "route of the proposed drainage and the tract of country "likely to be affected thereby in general terms, the sep-"arate tracts of land through which the proposed drain-"age will pass and give the names of the owners thereof "as appears from the records of the office of the Register "of Deeds on the date of the filing of the petition, and "shall refer to the files in the proceeding for further par-"ticulars." The notice shall also "summon *all persons* "*affected* by the proposed drainage to appear at such "hearing and show cause why the proposed drainage shall "not be established and constructed." (§ 4, ch. 134, Laws of 1907; § 2, ch. 102, Laws of 1909; § 8461, R. S. 1919). This notice is the only notice given to property owners prior to the establishment of a drainage ditch and is the only notice under which the Board can acquire jurisdic-

tion to make an assessment. The owners are named of the separate tracts of land through which the proposed drainage will pass but no description is given of the property *affected by the proposed drainage ditch or which will be assessed for the cost of the construction thereof.* The notice merely describes the route of the proposed drainage and the "tract of country likely to be affected thereby *"in general terms"* and then summons *"all persons af-"fected by the proposed drainage"* to appear at the hearing. A notice designating as the tract of country "likely "to be affected thereby in general terms" would be sufficient, if it named as such "tract of country" the entire county in which the drainage ditch is to be constructed. Nothing whatever is required in the notice by which any property owner, other than one owning land through which the ditch is to be constructed, is appraised that he is affected or that his land will be assessed for the construction of the proposed drainage ditch. In fact, all that the South Dakota law requires is for the Board of County Commissioners of a South Dakota county to publish and post a general notice summoning "all persons affected" to appear at the hearing, in order to support an assessment, for the construction of the ditch, upon all of the real property situated within the county limits. There is absolutely nothing in the statutory notice to inform any property owner that he will be called upon to pay an assessment. After the ditch is constructed, the Board of County Commissioners is at liberty, under the South Dakota statute, to extend the assessment to all property in every direction up to the county boundary lines. If this be sufficient notice, then after it is given, the Board of County Commissioners has the power to assess for the cost of the construction of any ditch every acre of property within the county limits.

At the hearing upon the petition, the South Dakota statute kindly permits "any person interested" to appear and contest the statements of the petition and matters set forth in the surveyor's report and the finding of the Board as to the width and route of the proposed ditch. After the hearing, the County Board may establish the drainage ditch. (§ 5, ch. 134, Laws of 1907; § 3, ch. 102, Laws of 1909; § 8462, R. S. 1919).

After the establishment of the drainage ditch, the Board of County Commissioners "shall fix the proportion of benefits of the proposed drainage among the lands affected and shall appoint a time and place for equalizing the same." (§6, ch. 134, Laws of 1907; § 4, ch. 102, Laws of 1909; § 8463, R. S. 1919). There is no statutory requirement as to how soon after the establishment of the drainage ditch this shall be done and it is not necessary that it be done before the drainage project has been completed. It must be done before an assessment is made for the purpose of paying the cost of the establishment of the drainage project but the assessment, when made, includes all costs already incurred, or thereafter to be incurred. (§ 7, ch. 134, Laws of 1907; § 5, ch. 102, Laws of 1909; ch. 130, Laws of 1911; § 8464, R. S. 1919.)

The notice of equalization of proportion of benefits is given by publication once in each week for two consecutive weeks in a newspaper of the county and by posting copies of the notice in three public places near the route of the proposed drainage. The law requires that the "notice "shall state the route and the width of the drainage estab- "lished, a description of each tract of land affected by "the proposed drainage and the names of the owners of "the several tracts of land as appears from the records "of the office of the Register of Deeds, at the date of filing "of the petition, and the proportion of benefits fixed by "each tract of property, taking any particular tract as a "unit, and shall notify all such owners to show cause why "the proportion of benefits shall not be fixed as stated." (§ 6, ch. 134, Laws of 1907; § 4, ch. 102, Laws of 1909; § 8463, R. S. 1919). Here for the first time there is published a description of each tract of land "affected" by the proposed drainage and the names of the owners of such tracts. As in the case at bar, the work may have been completed and an expense of over a quarter of a million dollars incurred before the Board of County Commissioners determines what particular lands are "affected" by the proposed drainage and gives notice to the owners of such lands. A property owner for the first time notified that his land is "affected" by the proposed drainage has no right to object in any manner to the establishment of the drainage project. He has nothing to say in re-

gard to its manner or cost of construction; he has no voice in the selection of the particular tract of land taken as a unit; and all concerning which he can be heard is as to whether the proportion of benefits "shall not be fixed "as stated."

It is now too late for the property owner to escape. He is like a rat in a trap. All that he can do is to appear before the Board of County Commissioners and object to the proportion of benefits which has been assessed against him and ask to have that proportion reduced by raising the proportion of some other property owner. He is precluded from raising any question whatsoever as to the right to include his property within the drainage area. He has nothing to say as to the necessity for the drainage project or as to its manner of construction or its cost. Without any notice, either personal or constructive, his property has been included in the drainage area under the general proclamation of the Board of County Commissioners and he has no redress.

Theirs not to make reply,
Theirs not to reason why,
Theirs but to do and die,

even though

Someone had blundered.

The property owner cannot question the validity of the proceedings. All that is left for him to do is to pay.

Our contention is that the South Dakota drainage statute is in violation of the due process of law clause of the fourteenth amendment to the federal constitution for the reason that no opportunity is given a property owner, whose property is "affected" by the proposed drainage project, to appear prior to the doing of the work and the making of the assessment for the construction cost.

In support of the constitutionality of the South Dakota drainage statute, counsel for appellants have cited *Spencer vs. Merchant*, 125 U. S. 345. That case was decided by a divided court. The legislature of the state of New York had, by express enactment, determined that certain lands should be included within an assessment district in which the cost of the improvement was to be proportioned. The majority of the court held "that the deter-"mination of the territorial district which should be taxed

"for local improvement is within the province of legisla-
"tive discretion." The courts in this and a line of suc-
ceeding cases have made a clear distinction between cases in which a taxing district has been established by an act of the legislature and cases in which special assessments are to be made by some taxing body upon the property "beneficially affected" but not included within any taxing district established by legislative enactment. In the cases of taxing districts established by act of the legislature no notice need be given to the property owners of the inclusion of their property within the district, but a different rule applies in cases in which the taxing district is determined by the area of the land "beneficially affected."

Fallbrook Irrigation District vs Bradley, 164 U. S. 112, also cited by counsel in support of the constitutionality of the South Dakota drainage law, is, when carefully read, a strong authority against the constitutionality of the South Dakota statute. In the very elaborate opinion in this case the Court (p. 167) says:

"The legislature not having itself described the dis-
"trict, has not decided that any particular land would or
"could possibly be benefited as described, and, therefore,
"it would be necessary to give a hearing at some time to
"those interested upon the question of fact whether or
"not the land of any owner which was intended to be in-
"cluded would be benefited by the irrigation proposed. If
"such a hearing were provided for by the act, the de-
"cision of the tribunal thereby created would be sufficient.
"Whether it is provided for will be discussed when we
"come to the question of the proper construction of the
"act itself."

Later on in the opinion the court discusses the question whether the statute does provide for a hearing prior to the formation of the district and holds that under the provision of the statute under consideration and under the construction given it by the supreme court of California, by which state it was enacted, the right of hearing is given the property owner prior to the formation of the district. The court discusses the statute (pp. 170-172):

"We come now to the question of the true construc-
"tion of the act. Does it provide for a hearing as to
"whether the petitioners are of the class mentioned and

"described in the act and as to their compliance with the "conditions of the act in regard to the proceedings prior "to the presentation of the petition for the formation of "the district? Is there any opportunity provided for a "hearing upon notice to the land owners interested in the "question whetheir their lands will be benefited by the "proposed irrigation? We think the right to a hearing "in regard to all these facts is given by the act and that it "has been practically so construed by the Supreme Court "of California in some of the cases, above cited from the "reports of that court and in the case cited in the briefs "of counsel. We should come to the same conclusion from "a perusal of the act. The first two sections provide for "the petition and a hearing. The petition is to be signed "by a majority of the holders of title to lands susceptible "of one mode of irrigation, etc. This petition is to be pre-"sented to the board of supervisors at a regular meeting, "and notice of intended presentation must be published "two weeks before the time at which it is to be presented. "The board shall hear the same, shall establish and de-"fine the boundaries, although it cannot modify those de-"scribed in the petition, so as to except from the district "lands susceptible of irrigation by the same system of "works applicable to the other lands in the proposed dis-"trict, and the board cannot include in the district, even "though included in the description in the petition, lands "which shall not, in the judgment of the board, be bene-"fited by irrigation by said system.

"If the board is to hear the petition upon notice, and "is not to include land which will not, in its judgment, be "benefited by irrigation by the system, we think it fol-"lows as a necessary and a fair implication that the per-"sons interested in or who may be affected by the pro-"posed improvement have the right under the notice to "appear before the board and contest the facts upon which "the petition is based, and also the fact of benefit to any "particular land included in the description of that pro-"posed district.

"It is not an accurate construction of the statute to "say that no opportunity is afforded the landowner to test "the sufficiency of the petition in regard to the signers "thereof and in regard to the other conditions named in

"the act; nor is it correct to say that the power of the "board of supervisors is, in terms, limited to making such "changes in the boundaries proposed by the petitioners "as it may deem proper, subject to the conditions named "in the act.

"When the act speaks of a hearing of the petition, "what is meant by it? Certainly it must extend to a "hearing of the facts stated in the petition, and whether "those who sign it are sufficient in number and are among "the class of persons mentioned in the act as alone having "the right to sign the same. The obvious purpose of the "publication of the notice of the intended presentation of "the petition is to give those who are in any way interest-"ed in the proceeding an opportunity to appear before "the board and be heard upon all the questions of fact, "including the question of benefits to lands described in "the petition. As there is to be a hearing before the "board, and the board is not to include any lands which "in its judgment will not be benefited, the plain construc-"tion of the act is that the hearing before the board in-"cludes the question as to the benefits of the lands, be-"cause that is one of the conditions upon which the final "determination of the board is based, and the act cannot "in reason be so construed as to provide that while the "board is to give a hearing on the petition it must never-"theless decide in favor of the petitioners, and must estab-"lish and define the boundaries of the district, although "the signers may not be fifty, or a majority of the hold-"ers of title, as provided by the act, and notwithstanding "some other defect may become apparent upon the hear-"ing."

It will be seen in *Fallbrook Irrigation District vs Bradley* that the California statute differs from the South Dakota statute in that the petition must "particularly de-"scribe the proposed boundaries of such districts" and the petition itself must be published. After the petition is published and has been passed upon by the Board of Supervisors the question of the formation of the irriga-tion district is submitted to an election of the electors of the district who are also freeholders. (*Fallbrook Irriga-tion District vs Bradley*, 164 U. S. 112, pp. 116-117). These facts differentiate the statute passed upon in *Fall-*

brook Irrigation District vs Bradley from the South Dakota statute under consideration. Under the California statute the boundaries of the proposed district are fixed in the first instance and after they have been determined then the question of the formation of the district is put to a vote of the freeholder electors. We submit therefore, that the decision in *Fallbrook Irrigation District vs Bradley* is a distinct authority in favor of our position that the South Dakota drainage statute is unconstitutional. The court expressly determines in that case that notice must be given to the property owner of the formation of the district before his property can be included in it, and one of the requisites of notice is that the property owner be advised in some manner, either actually or constructively, that his land will be included within the limits of the proposed project.

Embree vs Kansas City Road District, 240 U. S. 242, is another case relied upon by counsel in support of the constitutionality of the South Dakota law. Here, again, is a case which we submit directly sustains our contention as to the invalidity of the South Dakota statute. The Court in the opinion (pp. 246-248) says:

"The district was not established or defined by the "legislature, but by an order of the county court made "under a general law. Whether there was need for the "district and, if so, what lands should be included and "what excluded was committed to the judgment and dis"cretion of that court subject to these qualifications: "First, that the district should contain at least 640 acres "of contiguous land and be wholly within the county; sec"ond, that the court's action should be invoked by a peti"tion signed by the owners of a majority of the acres in "the proposed district, and, third, that public notice—con"ceded to be adequate—should be given, by the clerk of "the court, of the presentation of the petition and the "date when it would be considered, and that owners of "land within the proposed district should be accorded an "opportunity to appear, either collectively or separately, "and oppose its formation. In this connection the statute "says: 'The court shall hear such petition and remon" 'strance, and shall make such change in the boundaries " 'of such proposed district as the public good may re-

"'quire and make necessary, and if after such changes "'are made it shall appear to the court that such petition "'is signed or in writing consented to by the owners of "'a majority of all the acres of land within the district "'as so changed, the court shall make a preliminary order "'establishing such public road district, and such order "'shall set out the boundaries of such district as estab- "'lished . . . but the boundaries of no district shall be "'so changed as to embrace any land not included in the "'notice made by the clerk unless the owner thereof shall "'in writing consent thereto, or shall appear at the hear- "'ing and is notified in open court of such fact and given "'an opportunity to file or join in a remonstrance.' The "order actually made shows that four of the present plain- "tiffs, with three others, appeared in opposition to the "petition, recites that 'the court, after hearing and con- "'sidering said petition and said protests and remon "'strances and all evidence offered in support thereof, "'finds that the public good requires and makes necessary "'the organization, formation and creation of such pro- "'posed public road district . . . with boundaries as stated "'in said petition,' and sets out the boundaries of the "district as established.

"The sole purpose in creating the district, as the "statute shows, was to accomplish the improvement of "public roads therein—the particular roads to be desig- "nated by the district commissioners and an approving "vote of the land owners.

"As the district was not established by the legisla- "ture but by an exercise of delegated authority, there was "no legislative decision that its location, boundaries and "needs were such that the lands therein would be benefit- "ed by its creation and what it was intended to accom- "plish, and, this being so, it was essential to due process "of law that the land owners be accorded an opportunity "to be heard upon the question whether their lands would "be thus benefited. If the statute provided for such a "hearing, the decision of the designated tribunal would be "sufficient, unless made fraudulently or in bad faith. "*Fallbrook Irrigation District vs Bradley,* 164 U. S. 112, "174-175.

"Did the statute contemplate such a hearing? We

"have seen that it required that adequate public notice "be given of the presentation of the petition for the crea- "tion of the district and the time when it would be con "sidered, made provision for the presentation of remon- "strances by owners of lands within the proposed district, "and directed that the petition and remonstrances be "heard by the county court, that the court make such "change in the boundaries 'as the public good may re- "'quire' and that the boundaries be not enlarged unless "the owners of the lands not before included consent in "writing or appear at the hearing and be given an oppor- "tunity to present objections. That a hearing of some "kind was contemplated is obvious, and conceded."

The case of *Soliah vs Heskin*, 222 U. S. 522, is strongly relied upon by counsel. That is a case arising under the North Dakota drainage law. The opinion at first glance would seem to support the contention of counsel for Appellants but an examination of the North Dakota statute, upon which the case arose, discloses the fact that the North Dakota law was not subject to the same objections which are urged against the South Dakota enactment. Under the North Dakota statute, a petition for the construction of the drain is filed with the board of drain commissioners. This petition designates the starting point and terminus and general course of the proposed drain. The board of drain commissioners then employs surveyors who prepare profiles, plans, and specifications of the proposed drain, an estimate of the cost thereof, and a map or plat of the lands to be drained in duplicate, showing the regular subdivisions thereof, one copy of which is filed in the office of the county auditor in the county in which the drain is proposed to be constructed and the other with the board of drain commissioners, subject to inspection. Upon the filing of the surveyor's report, the board of drain commissioners fixes a date and public place for hearing objections to the petitions and gives notice of such hearing. The notices must contain a copy of the petition and a statement of the date of filing of the surveyor's report and the date when the board will act upon the petition, must be signed by a majority of the members of the drainage board and "shall be sent by "registered mail to the last known address of each and

"every *owner of land which may be affected* by the pro-"posed drain." The North Dakota statute therefore requires that the names of "each and every owner of land "which may be affected" be determined and actual notice given these at the very inception of the project and this notice must be given by sending to each owner a copy of the petition and of a statement of the date of filing the surveyor's report and the date upon which the board will act upon the petition. That is a very different proposition from merely publishing notice "to all persons whose "property is affected" without first determining who are affected, as required by the South Dakota statute. The opinion in the case of *Soliah vs Heskin* must consequently be read in the light of the North Dakota statute which provides for the giving of notice at two stages of the proceedings to the property owner, first, a notice before the drainage district is formed, and, second, a notice when the assessment of benefits is made. The North Dakota statute provides exactly the thing for the want of which the South Dakota statute is unconstitutional.

Counsel for Appellants place great reliance upon the recent case of *Milheim vs Moffat Tunnel District*, 262 U. S. 710. That case is clearly to be distinguished from the case at bar. It is a case arising upon an assessment made in a taxing district, the limits of which had been fixed by act of the legislature of the state of Colorado. The supreme court held, following *Spencer vs Merchant*, 125 U. S. 345, and other similar cases, that the legislative authority of a state extends to the formation of taxing districts and that a state legislature can enact a law fixing the boundaries of a taxing district without giving notice to the owners of property included therein. That is an entirely different proposition from the one arising under the South Dakota drainage law and the decision of the supreme court in *Milheim vs. Moffat Tunnel District* is not an authority in support of the South Dakota statute which on its face does not attempt to form a taxing district by legislative enactment.

The case of *Voight vs Detroit City*, 184 U. S. 115, was cited by JUDGE ELLIOTT in his opinion deciding this case in the District Court. This case is one of a line of cases involving the making of special assessments in cities

for various municipal purposes. See also *St. Louis Land Company vs Kansas City*, 241 U. S. 419. In this line of cases the courts hold that cities organized under general laws or special acts of the legislature may impose special assessments under general statutes authorizing the levying of assessments in proportion to benefits. In all such cases, it is held by the courts, some opportunity must be given the taxpayer to be heard as to the proportion of the benefits to be assessed against his property but the property owner is not entitled to a hearing upon the question of the determination whether the improvements shall be made for which the special assessment is levied.

In the case of *Central of Georgia Railway Company vs Wright*, 207 U. S. 127, the Supreme Court held (quoting from the syllabus): "Due process of law requires "that opportunity to be heard as to the validity of the tax "and the amount of the assessment be given to a taxpay- "er, who, without fraudulent intent and in the honest be- "lief that it is not taxable, withholds property from tax "returns, and this requirement is not satisfied where the "taxpayer is allowed to attack the assessment only for "fraud and corruption."

In *Londoner vs Denver*, 210 U. S. 373, the Court, passing upon a Colorado statute, says:

"In the assessment, apportionment and collection of "taxes upon property within their jurisdiction the Con- "stitution of the United States imposes few restrictions "upon the States. In the enforcement of such restric- "tion as the Constitution does impose this court has re- "garded substance and not form. But where the legis- "lature of a State, instead of fixing the tax itself, com- "mits to some subordinate body the duty of determin- "ing whether, in what amount, and upon whom it shall "be levied, and of making its assessment and apportion- "ment, due process of law requires that at some stage "of the proceedings before the tax becomes irrevocably "fixed, the taxpayer shall have an opportunity to be "heard, of which he must have notice, either personal, by "publication, or by a law fixing the time and place of the "hearing. *Hager vs Reclamation District*, 111 U. S. 701; "*Kentucky Railroad Tax Cases*, 115 U. S. 321; *Winona &* "*St. Peter Land Co. vs Minnesota*, 159 U. S. 526, 537;

"*Lent vs Tillson,* 140 U. S. 316; *Glidden vs Harrington,* "189 U. S. 255; *Hibben vs Smith,* 191 U. S. 310; *Security* "*Trust Co. vs. Lexington,* 203 U. S. 323; *Central of* "*Georgia vs Wright,* 207 U. S. 127. It must be remem- "bered that the law of Colorado denies the landowner "the right to object in the courts to the assessment, upon "the ground that the objections are cognizable only by "the boards of equalization.

"If it is enough that, under such circumstances, an op- "portunity is given to submit in writing all objections to "and complaints of the tax to the board, then there was a "hearing afforded in the case at bar. But we think that "something more than that, even in proceedings for tax- "ation, is required by due process of law. Many require- "ments essential in strictly judicial proceedings may be "dispensed with in proceedings of this nature. But even "here a hearing in its very essence demands that he who "is entitled to it shall have the right to support his alle- "gations by argument however brief, and, if need be, by "proof, however informal. *Pittsburg &c Railway Co. vs* "*Backus,* 154 U. S. 421, 426; *Fallbrook Irrigation District* "*vs Bradley,* 164 U. S. 112, 171, *et seq.* It is apparent "that such a hearing was denied to the plaintiffs in error. "The denial was by the city council, which, while acting "as a board of equalization, represents the state. *Ray-* "*mond vs Chicago Traction Co.,* 207 U. S. 20. The as- "sessment was therefore void, and the plaintiffs in error "were entitled to a decree discharging their lands from "a lien on account of it."

In *Turner vs Wade,* 254 U. S. 64, the Court held (quoting from the syllabus) as follows:

"The Georgia Tax Equalization Act (Laws, 1913, p. "123 §§ 6-7), empowers the Board of County Tax Assess- "ors to assess property for taxation and requires it to "notify the taxpayer of changes made in his returns; it "gives him, if dissatisfied, the right to demand an arbitra- "tion, and provides that a majority of three arbitrators, "one appointed by him, one by the Board and the third by "the two so selected, shall fix the assessment; but the "arbitrators must render their decision within ten days "from the naming of the arbitrator by the board, other- "wise the Board's decision—i. e., its assessment—stands

"affirmed; and no notice is afforded the taxpayer before "the making of the Board's assessment, nor any oppor- "tunity to be heard concerning it save that before the "arbitrators. Held, that an assessment so made by the "Board of County Tax Assessors, increasing the valua- "tion returned by a property owner, without notice or "hearing, was without due process of law, where his rem- "edy by arbitration proved abortive because the arbitra- "tors, though agreeing that the assessment was excessive, "could no two of them unite on a new assessment before "the ten day limitation expired."

We contend that an examination of the decisions of this Court pertinent to this case discloses that the following principles of law have been laid down:

First: That "due process of law" requires that at some stage of the proceedings the taxpayer must have an opportunity to appear and be heard *both as to the validity of the tax and as to its amount.*

Second: That the state legislature possesses the authority, by direct legislative enactment, to establish taxing districts and to fix the boundaries thereof without notice to the property owners included within such district.

Third: That where, by direct legislative enactment, certain territory has been formed into a taxing district the taxing authorities of such district may impose special assessments upon the property situated within the taxing district, pursuant to powers conferred by the legislature upon the taxing authorities, without first giving the property owner an opportunity to be heard as to the necessity for the making of the improvement, but in such cases the taxpayer must be given an opportunity to be heard as to the amount of the tax which he is to be compelled to pay.

Fourth: That in cases in which a taxing area or district is not formed by direct act of the legislature but is formed for the making of some public improvement by special assessments upon the property contained in the area or district, by local officers through authority delegated to them by the legislature to act upon petition of property owners, it is *absolutely essential to the validity of the proceedings that notice be given to the property owners whose interests are affected before the taxing area or dis-*

trict can be formed, the work done, and a tax imposed. The notice is not necessarily a personal one and may be by publication *but a notice of some character is essential.*

Analyzing all of the cases upon the subject, there cannot be found a single case in which a law containing the provisions of the South Dakota drainage law has been sustained by the courts. In every instance in which a law has been held valid there was a positive requirement that notice should be given to the taxpayer of a hearing upon the question of the making of the proposed improvements. In every instance the property affected has been definitely determined before the hearing and the property owner has been advised in some manner that his property is included within the area upon which it is intended that a tax or asssesment be imposed.

Search the law reports through; there cannot be found a case in which a mere general notice directed to "all persons affected" has been held to be a sufficient notice to a property owner that his property is to be included within an assessment area.

The inequity of a law like that of South Dakota is well illustrated by the results of the proceedings of the Board of County Commissioners of Minnehaha county in the case at bar. Under a notice to "all persons affected" it is sought to assess for the construction of the works in Drainage Ditch No. 1 and 2 not only the area formerly assessed for the construction of Drainage Ditch No. 1 and for the construction of Drainage Ditch No. 2, but to assess also property situated several miles from any of the work done in Drainage Ditch No. 1 and 2 and miles away from any of the land in the area assessed for the original construction of Drainage Ditch No. 1 or of Drainage Ditch No. 2. Property, that could not by any possibility be drained by the work done in Drainage Ditch No. 1 and 2 and that could not even remotely be benefited by that work, was included in the assessment area, and under the notice there could have been included just as well any other property situate within the limits of the 800 square miles comprising Minnehaha county.

If the County Commissioners of Minnehaha county had been required by the South Dakota drainage law to obtain, in the first instance, a survey and plat of the pro-

posed drainage area, and then to notify, either personally or by mail, publication, or posting, the property owners interested in that area, their proceedings might have had a semblance of legality, but under the South Dakota statute no such procedure is required. The County Commissioners have before them the names of the property owners through whose lands the drainage ditch passes but neither the Board of County Commissioners nor any one else has the slightest idea of what lands will be assessed for the cost of the construction of the drainage ditch. The only notice that is given to anyone is the general notice to "all persons affected." After the drainage works are completed, then for the first time a survey is made for the purpose of ascertaining what lands are "affected" and shall be assessed. The County Commissioners fix the proportion of benefits and publish the notice which, for the first time, informs the property owner that his land is liable for the assessment. It is then too late to lock the barn door. The horse has already been stolen. The drainage project has been constructed, the cost incurred, and all that is left for the property owner to do is to pay his assessment and "look pleasant." We reiterate, that never has a law of this character been sustained by this Court. All decisions of this Court, cited in support of the constitutionality of the South Dakota statute, can be easily distinguished as they are all of them based upon facts and principles of law which are not found in this case.

The bill in this case attacked directly the constitutionality of the South Dakota Drainage Statute. In the District Court the District judge upheld the constitutionality of the statute but granted an injunction upon other grounds (*Chicago, Rock Island & Pacific Railway Co. vs Risty*, 282 Fed. 364). In the Circuit Court of Appeals JUDGE KENYON, in delivering the opinion of the Court, expressly avoided passing upon the constitutional questions involved and while he expressly admitted that these questions were very grave ones, he held that their determination was not necessary to the decision of the case in that court and affirmed on other grounds the decision of the District Court.

Upon this appeal in this court, the constitutionality of the South Dakota Drainage Statute is again brought

before the court by the averments of the bill and answers and by the evidence introduced upon the trial in the District Court and preserved in the record in this Court. The position taken by the Plaintiff and Appellant is, that the South Dakota Drainage Law is in violation of the provisions of the Fourteenth Amendment to the Constitution and while, as will be discussed in a later portion of our argument, we contend that the proceedings taken by the Board of County Commissioners of Minnehaha County were so irregular as to render them invalid even if the statute were constitutional, we now submit, that on account of the unconstitutional provisions of the South Dakota Drainage Law the Board of County Commissioners of Minnehaha County possessed no authority to make assessments against the property of Appellee for the purpose of defraying the costs of the construction of Drainage Ditch No. 1 and 2.

In concluding our discussion upon this branch of this case we submit that the South Dakota drainage statute is unconstitutional in that no notice to property owners is required before a drainage assessment area is established or the work constructed and consequently the statute is unconstitutional as authorizing the taking of property without due process of law, contrary to the fourteenth amendment to the federal constitution.

II.

THE SOUTH DAKOTA DRAINAGE LAW IS IN VIOLATION OF SECTIONS 2 AND 13 OF ARTICLE VI OF THE SOUTH DAKOTA STATE CONSTITUTION AND IS THEREFORE UNCONSTITUTIONAL.

We now come to the question of the constitutionality of the South Dakota drainage law under the provisions of the South Dakota State Constitution. Section 2 of Article VI of the South Dakota Constitution provides as follows:

"§ 2. No person shall be deprived of life, liberty or "property without due process of law."

Section 13 of Article VI of the South Dakota Constitution provides as follows:

"§ 13. Private property shall not be taken for public "use, or damaged without compensation * * * * *"

It will thus be seen that the South Dakota state constitution contains not only the due process of law clause contained in the fourteenth amendment to the federal constitution but also the just compensation clause contained in the fifth amendment to the federal constitution, thus making the provisions applicable to the state which by the fifth amendment are made applicable to the federal government.

The South Dakota drainage statute has a number of times been before the South Dakota supreme court for construction in various of its phases but the question as to the constitutionality of the statute, by reason of its failure to provide a notice to property owners before the assessment area is determined, has never been presented to the South Dakota supreme court or passed upon by that court. Shortly prior to the institution of the case at bar, a suit was commenced in the circuit court of Minnehaha county, South Dakota, by one Oluf O. Gilseth against the Board of County Commissioners of Minnehaha county and other persons, to restrain certain acts with relation to the making of an apportionment of benefits for the construction of the drainage works in controversy in the case at bar. Gilseth, the plaintiff in that case, was a property owner residing upon the flats north of the city of Sioux Falls upon whose land the County Commissioners were attempting to make an assessment. The South Dakota supreme court held that Gilseth was estopped by his actions with respect to the construction of the drainage works from objecting to an assessment to pay for their cost of construction, and the decision appears as *Gilseth vs Risty*, 46 S. D. 374. In the opinion of the majority of the Court, the Court says: "We do not understand that "appellant questions the constitutionality of the law un- "der which the said project was carried out." The Court thereupon proceeds to determine the case under the assumption that the law is constitutional and that the plaintiff, Gilseth, makes no attack upon it. In the dissenting opinion filed by one of the Judges of the Supreme Court of South Dakota in *Gilseth vs Risty*, the question of the constitutionality of the statute is discussed but the opinion

of the majority of the Court decides the case under the express reservation that the question of constitutionality is not involved.

The Supreme Court of South Dakota, in the case of *Evans vs Fall River County*, 9 S. D. 130, stated the law in that jurisdiction in the following language:

"Notice to the taxpayer is a jurisdictional matter, "and his right to be heard in opposition to an assessment, "or to the amount thereof, is vitally essential to the valid- "ity of every assessment. *Black, Tax Titles*, 488; 2 "*Blackw. Tax Titles*, 953; *Cooley, Tax'n*, 227; *County of* "*Santa Clara vs Southern Pac. R. Co.*, 18 Fed. 385; *Pow-* "*ers vs. Larrabee (N. D.)*, 49 N. W. 724; *Bank vs. Maher*, "9 Fed. 884."

From the foregoing citation it will be seen that the Supreme Court of South Dakota recognizes the doctrine laid down by the Supreme Court of the United States to the effect that in a special assessment proceeding the taxpayer must have the right, at some time or other, and in some manner or other, to be heard both as to the validity and as to the amount of the assessment.

The same argument which we have made relating to the unconstitutionality of the South Dakota drainage statute under the fourteenth amendment to the federal constitution applies with equal force to the statute considered in the light of the provisions of the South Dakota constitution.

We therefore contend that the South Dakota drainage law is unconstitutional under the constitution of that State for the reason that no notice is given the property owner of the proceedings precedent to the determination of the boundaries of the assessment area.

Counsel for Appellants argue that the proceedings had in the case at bar are valid for the reason that, as a matter of fact, the drainage notice did contain a description of the property sufficient to give notice to each property owner whose lands were affected. We do not by any means concede that the notice given was sufficient to apprise property owners that their lands were to be subject to assessment for the payment of the cost of the construction of the drainage project, but even if the Board of County Commissioners of Minnehaha county had pub-

lished a notice sufficient for that purpose it would not have helped the situation. The statute does not require any such notice to be published and is consequently unconstitutional. Validity cannot be injected into an unconstitutional and void statute by taking under it the proceedings which would have to be taken under a constitutional and valid status. The law being unconstitutional, all proceedings under it are invalid *ab initio*.

III.

THE LEGISLATURE OF SOUTH DAKOTA HAS NEVER EXERCISED THE AUTHORITY GRANTED TO IT BY SECTION 6 OF ARTICLE XXI OF THE SOUTH DAKOTA CONSTITUTION PROVIDING FOR THE ORGANIZATION OF DRAINAGE DISTRICTS.

To the proper determination of this case, there is necessary a consideration of just what of the powers granted to it by the South Dakota constitution the legislature of that state has attempted to exercise by the enactment of the South Dakota drainage statute. This involves an analysis of the exact phraseology of the constitutional provision under which the legislature obtained its power to act. Section 6 of Article XXI of the constitution constitutes that authority and is as follows:

"§ 6. The drainage of agricultural lands is hereby "declared to be a public purpose and the legislature may "provide therefor, and may provide for the organization "of drainage districts for the drainage of lands for any "public use, and may vest the corporate authorities there-"of, and the corporate authorities of counties, townships "and municipalities, with power to construct levees, drains "and ditches, and to keep in repair all drains, ditches and "levees heretofore constructed under the laws of this "state, by special assessments upon the property bene-"fited thereby, according to benefits received."

The first clause of the foregoing section declares that the drainage of agricultural lands is a public purpose, and gives the legislature power to "provide therefor." This clause is complete in itself and to determine its meaning and intent requires no aid from the remainder of the section.

The section then goes further and gives the legislature authority to "provide for the organization of drain-"age districts for the drainage of lands for any public "use." This is a power conferred upon the legislature distinct and in addition to that contained in the first clause of the section. It gives the legislature authority to establish drainage districts for the purpose, not only of carrying into effect the power to drain agricultural lands, but for the purpose of carrying on any drainage project for "any public use."

As the section stands, when the first and second clauses are considered together, it appears that three things are provided for: (a) the drainage of agricultural lands is made a public purpose, (b) the legislature is given power to provide for the drainage of agricultural lands, and (c) the legislature is given power to provide for the organization of drainage districts for the drainage of land for any public use.

The constitutional section then continues giving to the legislature authority, (a) to vest the corporate authorities of drainage districts with power to construct levees, drains and ditches and keep in repair all drains, ditches and levees theretofore constructed under the laws of the state, by special assessments upon property benefited thereby, according to benefits received, and (b) to vest the corporate authorities of counties, townships, and municipalities with power to construct levees, drains and ditches and keep in repair all drains, ditches, and levees theretofore constructed under the laws of the state, by special assessments upon the property benefited thereby, according to the benefits received.

Throughout the entire section there appears a clear intent to authorize the legislature to proceed in matters respecting drainage of lands in either of two ways, (a) by the organization of drainage districts with corporate authorities, and (b) by empowering the corporate authorities of counties, townships and municipalities with power to enter upon and carry out drainage projects. It is not made obligatory upon the legislature to follow either system for the construction of drainage. The constitution gives the legislature the option to carry on drainage work by drainage districts organized as separate en-

tities, or to carry on the work through the regularly constituted authorities of counties, townships, and municipalities. The legislature of South Dakota, acting under the constitutional option given it by Section 6 of Article XXI of the constitution, has declined to provide for the organization of drainage districts as separate corporate entities, and has provided for the doing of all drainage work through the corporate authorities of the various counties, to-wit, the Board of County Commissioners, county auditor, county treasurer, and other county officers.

It follows that in the case at bar there was not and could not under the law have been formed any drainage districts. The drainage projects, known as Drainage Ditch No. 1, and Drainage Ditch No. 2, and Drainage Ditch No. 1 and 2, were all conceived and carried out by the county authorities of Minnehaha county under the constitutional provision giving the legislature the power to vest in the county authorities the power to construct levees, drains, ditches, etc. The legislature never attempted to exercise the power given it by the constitution to organize drainage districts, and the application of the term "district" to the assessment area of Drainage Ditch No. 1, Drainage Ditch No. 2, or Drainage Ditch No. 1 and 2 is a misnomer. That term is reserved by the South Dakota constitution for an entirely different sort of organization and should not be used in connection with a drainage project carried on by the Board of County Commissioners under the South Dakota statute.

The situation with respect to this matter was pointed out by Judge Elliott in his opinion upon the trial of this case in the District Court. *Chicago, Rock Island & Pacific Railway Company vs Risty,* 282 Fed. 364. In this opinion, Judge Elliott says, (p. 368): "Pursuant to this "provision of the constitution, the legislature of the state "has provided for the drainage of agricultural lands: "*but nowhere is there any statutory enactment under "which drainage districts may be formed for the drain-"age of lands 'for any public use.'*"

A further examination of the particular wording of Section 6 of Article XXI of the South Dakota constitution discloses the important bearing which the failure of

the legislature to exercise the authority of establishing drainage districts has upon the decision of the case at bar. The wording of the constitutional provision is that the legislature "may provide for the organization of drain-"age districts for the drainage of lands for any public use," and may vest "the corporate authorities thereof," etc. Eliminate the quoted words (which are the only ones in the section referring to drainage districts) from the section and the result would be that the section would read, "The drainage of agricultural lands is hereby de-"clared to be a public purpose and the legislature may "provide therefor, and may vest the corporate authori-"ties of counties, townships and municipalities with pow-"er to construct levees, drains, and ditches, etc."

In other words, the South Dakota legislature is given authority to carry on drainage projects either through the formation of drainage districts as corporate entities, or through the municipal authorities of the counties, townships, and municipalities, but while drainage "for "any public use" may be constructed through corporate drainage districts, drainage of lands for agricultural purposes only may also be carried on by the county, townships and other municipal authorities. The constitution nowhere gives the legislature power to provide that drainage for "any public use" other than the drainage of agricultural lands may be constructed by the county, township, or other municipal authorities. Drainage for any other public purpose must be constructed by districts specially organized therefor.

It consequently follows that the legislature of South Dakota cannot, under the provisions of the state constitution, authorize drainage projects, for other than agricultural lands, to be conducted by the county, township, or other municipal authorities. Such authorities may construct drainage projects for the drainage of agricultural lands, but for any other public purposes the works must be constructed by the corporate authorities of drainage districts established for that purpose.

While the legislature of South Dakota had the right, under the state constitution, to enact a law authorizing the Board of County Commissioners of Minnehaha county to construct a drainage project for the drainage of agri-

cultural lands, it could not, under the constitution, authorize the Board of County Commissioners to carry on any drainage project for any public use other than the drainage of agricultural lands.

It follows, therefore, that if Drainage Ditch No. 1 and 2 was initiated by the Board of County Commissioners of Minnehaha county for a purpose other than the drainage of agricultural lands, the Board exceeded their powers in constructing the dams, ditches, spillway, and other works in Drainage Ditch No. 1 and 2, for which Appellee is now asked to pay a proportionate part. The question whether Drainage Ditch No. 1 and 2 was a project for the drainage of agricultural lands or for some other purpose we will discuss in a separate section of this brief.

IV.

DRAINAGE DITCH NO. 1 AND 2 WAS NOT A PROJECT FOR THE DRAINAGE OF AGRICULTURAL LANDS, AND THE ACTION OF THE BOARD OF COUNTY COMMISSIONERS OF MINNEHAHA COUNTY IN ENTERING UPON THE PROJECT AND IN CARRYING IT ON WAS *ULTRA VIRES*.

We now come to the consideration of the question as to whether Drainage Ditch No. 1 and 2 was a project for the drainage of agricultural lands or for the carrying out of some other purpose. There are at this time before this court pending appeals in six cases involving Drainage Ditch No. 1 and 2, and there is a divergence of views of the Appellees in various of the six cases as to the status of the drainage proposition. In some of the cases, the Appellees contend that Drainage Ditch No. 1 and 2 was simply a continuation of Drainage Ditch No. 1 and of Drainage Ditch No. 2, and that the work was initiated and carried on by the Board of County Commissioners of Minnehaha county as a project for the repairing of Drainage Ditch No. 1 and of Drainage Ditch No. 2. In the case at bar, the position which we take is that Drainage Ditch No. 1 and 2 must be considered as an independent project entered upon by the Board of County Commissioners and that it is not a mere project for the re-

pair of Drainage Ditch No. 1 and of Drainage Ditch No. 2, and is not in any manner controlled by the original proceedings for the construction of the old ditches. We contend that Drainage Ditch No. 1 and 2 must be considered as if it were an entirely new proposition entered upon after the spillway at the outlet of Drainage Ditch No. 1 had been washed out in the spring of 1916.

In the bill in this suit, it is alleged that the Board of County Commissioners of Minnehaha county has spent a sum in excess of $255,000 in the construction of a spillway, dams, and retaining gates, "designed not for the "purpose of drainage of agricultural lands, but solely "for the purpose of controlling and retarding the flow "of water, through the outlet of said Drainage Ditches "No. 1 and No. 2 into the Big Sioux river for the pur-"pose of preventing a change in the channel of said river "and of preventing the drainage of the gravel bed through "which the said city of Sioux Falls obtains its water "supply." It is further alleged that less than five per cent of such money has been expended for any purpose legitimately connected with the construction and maintenance of Drainage Ditch No. 1 and of Drainage Ditch No. 2. The bill further sets up the alleged proceedings for the organization of Drainage Ditch No. 1 and 2.

The answer sets up the organization of Drainage Ditch No. 1 and 2 as a separate organization from Drainage Ditch No. 1 and Drainage Ditch No. 2, and the theory of Appellants is that Drainage Ditch No. 1 and 2 was a separate and independent organization and not a mere continuation of Drainage Ditch No. 1 and Drainage Ditch No. 2, and that its formation was compelled for the purpose of saving the water supply of the city of Sioux Falls, and preventing the change of the channel of the Big Sioux river, and the imperiling of the interests of various property owners.

The position of Appellants throughout this case has been that Drainage Ditch No. 1 and 2 was a new and separate organization. They have so pleaded, and with their allegations in this regard we have no contention to make. The Appellee in this case is satisfied to rest this proposition upon the allegations of the answer and to concede that Drainage Ditch No. 1 and 2 was a new or-

ganization and was entirely independent of the original ditches. As we have said, in others of the six cases tried at the same time and upon the same record as this case, the plaintiffs (Appellees in this court) contested the claim of the defendants and intervenors (Appellants in this court) that Drainage Ditch No. 1 and 2 was a new and independent proposition and contended that all of the work done by the Board of County Commissioners was done merely as a continuation of the work upon the original ditches, Drainage Ditch No. 1 and Drainage Ditch No. 2. JUDGE ELLIOTT, in his opinion filed in the District Court, arrived at the conclusion that Drainage Ditch No. 1 and 2 was not a new and independent organization but was simply a continuation of the old original ditches. *Chicago, Rock Island & Pacific Railway vs Risty*, 282 Fed. 364 (p. 374 *et seq*).

With due respect to the opinion of the learned District Judge (who evidently felt inclined to hold so as not to preclude the holders of the drainage ditch warrants from a right to recover the amount of their investments from the property owners within the original assessment area of the Drainage Ditch No. 1 and of Drainage Ditch No. 2), we respectfully submit, that under the allegations of the bill and answer in this case, and under the evidence contained in the record, Drainage Ditch No. 1 and 2 must be deemed to be a new and independent organization and must stand or fall as such. If it possesses no life of its own, life cannot be injected into it by treating it as a continuation of the old original ditch organizations.

It appears from the evidence in this case that after the outlet of Drainage Ditch No. 1 had been washed out in the spring of 1916, various plans were proposed for the controlling of the water so as to prevent the formation of a new river channel and the draining of the gravel bed, from which the city of Sioux Falls obtained its water supply. No changes in Drainage Ditch No. 1 and Drainage Ditch No. 2 were required for the purpose of draining agricultural lands in the flats north of the city of Sioux Falls. The two ditches were working beautifully, so far as that purpose was concerned. They formed a perfect, complete and satisfactory system for the drainage of the flats. The property owners in the

flats could not have asked for any drainage system more complete. The trouble was, that instead of draining too little, the ditches drained too much, and were too efficient in their operation. No change in them was required for any purpose connected with the drainage of agricultural lands. The only people interested were those who objected to the formation of a new channel for the Big Sioux river and who were interested in maintaining a water supply for the city of Sioux Falls. The change in the course of the river, if made, would have operated to destroy various industries dependent upon the water power at the dams south of the falls. It would also have prevented the flow of the water through the city limits, and would have forced the city of Sioux Falls to seek some other municipal water supply.

The Board of County Commissioners, after various plans had been considered and for one reason after another abandoned, finally formed a new organization under the name of Drainage Ditch No. 1 and 2, and went ahead and expended upwards of $250,000 in the construction of a spillway, retaining walls, retaining dams, ditches, etc. The greater part of the money was invested in a spillway, dam and retaining walls which were purposely intended to retard, rather than to accelerate the flow of the surface water which collected upon the flats north of the city of Sioux Falls, and which consequently were intended to hinder rather than to facilitate the drainage of the flats.

After $255,000 and over had been expended upon the spillway and other water retaining works, the Board of County Commissioners proceeded to make an apportionment of benefits upon the lands "affected" by the improvement. In the assessment area, the Board of County Commissioners included not only the territory which had been included in the assessment area of the original ditches, Drainage Ditch No. 1 and Drainage Ditch No. 2, but also included all of the lands and lots within a considerable distance on either side of the Big Sioux river between the south boundary of the property in the assessment areas of the original ditches, along the channel of the Big Sioux river for a distance of some nine miles, along where the river runs west and south of

the city of Sioux Falls and through the city, and up to a point a short distance north of Sioux Falls. The ostensible reason for the inclusion of all this additional territory was the alleged fact that the property along the river was subject to floods at the time of freshets which would be relieved by the construction of the spillway and other water retaining works. Upon the trial, it was shown that with the exception of a small tract of territory immediately south of the original ditch assessment areas, the remainder of the lands, for a space of eight or nine miles along the channel of the Big Sioux river, had never suffered from flood waters, excepting in the spring of 1881, and that the occasion for the flood in that year was not the collection of water upon the flats north of the city of Sioux Falls, but the forming of an ice gorge at a point in the river in the southeast portion of the city. There was consequently a total lack of any proof in the record that the territory, along the channel of the river and through the city of Sioux Falls attempted to be included in the assessemnt area, was in any manner affected, beneficially or otherwise, by the construction of the spillway and other water retaining works.

In addition, the Board of County Commissioners attempted to proportion "benefits" to the City of Sioux Falls, the Northern States Power Company (owners of the waterpower on the Big Sioux river above the falls), and upon four railroad companies (one of which was Appellee) having railroad tracks and station grounds situated within the attempted assessment area. In the case of Appellee, and of one of the other railroad companies sought to be assessed, the railroad owned right of way and trackage both in the assessment areas of the original ditches and in the additional territory attempted to be included within the assessment area of Drainage Ditch No. 1 and 2. The other two railroads owned trackage and property only in the new territory and had no mileage or station grounds in the original assessment areas. In the decrees entered in the various railroad cases, the District Court enjoined the assessment of the railroad properties not included in the original assessment areas but reserved, without prejudice, the deter-

mination of the question whether Appellee and the other railroad companies having land both in the original assessment areas and in the new assessment area should be held liable for an assessment upon its property in the original assessment area.

The question therefore arises whether, under the record in this case, the Board of County Commissioners of Minnehaha county possesses authority to make any apportionment of benefits whatsoever, or any assessment upon any property whatsoever, for the cost of the construction of the works in Drainage Ditch No. 1 and 2. Our contention in this regard is as follows:

It is alleged by the defendants and Appellants in their answer, and Appellee admits it to be a fact, that Drainage Ditch No. 1 and 2 was a new and independent proposition and not a continuation of Drainage Ditch No. 1 and of Drainage Ditch No. 2, and cannot be considered as a proposition for the repair of the original ditches. It is a project which must stand or fall upon its own footing.

Under the evidence in this case, Drainage Ditch No. 1 and 2 was not a project for the drainage of agricultural lands but was a project for another "public use," to-wit, the preservation of the water flowage in the channel of the Big Sioux river and of the supply of water in the gravel bed from which the city of Sioux Falls obtains its water supply. Neither of these propositions involves the drainage of agricultural lands. Drainage Ditch No. 1 and Drainage Ditch No. 2 had completely accomplished the object of draining the flats north of the city of Sioux Falls. If those drainage works were damaging other property interests, the remedy for the persons interested was to have the ditches abated as nuisances. Instead of pursuing this course, the Board of County Commissioners of Minnehaha county entered upon the construction of an elaborate system of water retaining works by which the water, which was collected from the flats into Drainage Ditch No. 1 and Drainage Ditch No. 2, could be retained until it could be passed off gradually into the Big Sioux river. To have abated Drainage Ditch No. 1 and Drainage Ditch No. 2 as nuisances, would have been to permit

the water, accumlating upon the flats, to remain there until it could flow off through its natural channel around the bends in the Big Sioux river, the same as it did before Drainage Ditch No. 1 and Drainage Ditch No. 2 were constructed. Instead, however, of doing this, the Board of County Commissioners proceeded to construct a new water retaining system by which the water could be retained upon the flats until it could gradually be drawn off, partly through the natural channel of the river and partly through a restricted passageway formed by the spillway and its attendant retaining walls and dams. In other words, the Board of County Commissioners proceeded to spend $250,000 and over for the purpose of accomplishing the same object that could have been accomplished by damming up the original ditches and leaving the flats in the same condition that they were before the original ditches were constructed. While some evidence was introduced, tending to show that a portion of the water collecting upon the flats passed off through the spillway, it remained in the evidence almost uncontradicted that the situation in the flats above the city of Sioux Falls is as bad as it was before any drainage ditches were constructed.

From all of the evidence in the record in this case, it would appear that the construction of the spillway and other works, under the organization of Drainage Ditch No. 1 and 2, was not for the purpose of draining agricultural lands but was for an entirely different purpose. This is the conclusion to which JUDGE ELLIOTT came in his opinion in the District Court, and upon this subject JUDGE ELLIOTT says, *Chicago, Rock Island and Pacific Railway Company vs. Risty,* 282 Fed. 364 (p. 378):

"There is another and further suggestion: I am of "the opinion that this reconstruction of the old spillway "without change of location, the repair of the break from "the river into the ditch, the cleaning of the ditch, the "change of the headgates where the flood waters are "taken from the river, everything that was done under "this pretended establishment of a new ditch, could not "have been viewed in the same light or as serving the "same purpose as the construction of the original ditches,

"because the thing that caused the board of commis-
"sioners to take any action with reference to the condi-
"tion that then existed was the danger that existed be-
"cause of the conduct of the water down through these
"two drainage ditches to and through this spillway. The
"danger that was threatened was not that the agricultural
"lands would not be drained, but that immense damage
"was threatened, that the course of the river was to be
"diverted to this cut-off, that great areas of land were
"threatened to be cut away by this river 100 feet deep,
"and that the water supply of the city was threatened
"to be taken away because of this drainage ditch and
"this imperfect spillway, because the water was to be
"taken from the river and all of the benefits of the river
"for several miles, through and around the city of Sioux
"Falls, would be destroyed. The power of the Northern
"States Power Company would be destroyed, by taking
"the water from the river. If it had not been for those
"conditions, for these threatened dangers, no action would
"have been taken; the ditches would have continued to
"function as they had functioned before. If the spill-
"way had been properly constructed originally, and if it
"had not proven inadequate, there would have been no
"cause for any action by the board in the year 1916.
"Every consideration that impelled action by the board
"was some phase of the threatened danger by reason
"of the inadequate and imperfect construction of these
"two ditches. Neither of these considerations that in-
"fluenced the action of the board *had anything to do with*
"draining agricultural lands."

As has been shown, the legislature of South Dakota has never passed an act, putting into effect the authority vested by the constitution in the legislature to create drainage districts. As has also been shown, while drainage of agricultural lands can be carried on by county, township, and other municipal authorities, drainage for other "public uses" can only be constructed by drainage districts through their corporate authorities. It appearing from the record in this case that the work done under the organization of Drainage Ditch No. 1 and 2 was not for the purpose of agricultural lands but for other "public uses," it follows that the Board of County

Commissioners of Minnehaha county exceeded its authority in attempting to organize Drainage Ditch No. 1 and 2 and to construct the spillway and attendant works. Upon this proposition, JUDGE ELLIOTT, in his opinion, says:

"It may be said that to remedy these wrongs consti-
"tuted a public use, as referred to in the constitution of
"the state of South Dakota. Admitting that that is true,
"we are confronted with the proposition that there has
"been no legislation, conforming with the provisions of
"the constitution, authorizing the legislature to provide
"for the establishment of drainage districts and in the
"naming of officers with the powers therein referred to.
"If, therefore, any claim were made that the commis-
"sioners were acting under this authority, independent
"of the provision of law with reference to the drainage
"of agricultural lands, the answer is that the provision
"of the constitution is not selfexecuting, and that no leg-
"islation has been provided carrying this provision of
"the constitution into effect."

We therefore submit, that as the construction of the spillway and other attendant works was not a project for the drainage of agricultural lands, and as drainage for public uses other than the drainage of agricultural lands can, in South Dakota, only be carried on by the corporate authorities of drainage districts, and as the legislature of South Dakota has never authorized the organization of drainage districts with corporate authorities, all of the acts of the Board of County Commissioners of Minnehaha county, in attempting to organize Drainage Ditch No. 1 and 2, and in constructing the spillway and attendant works under such organization, were *ultra vires*, and that no apportionment of benefits or assessment for the cost of such construction can be made upon the property of Appellee.

V.

THE SOUTH DAKOTA DRAINAGE LAW IS UNCONSTITUTIONAL, SO FAR AS RESPECTS ASSESSMENTS OF RAILROAD PROPERTY, IN THAT IT PROVIDES FOR THE GIVING OF NO NOTICE WHATEVER OF THE APPORTIONMENT AND

EQUALIZATION OF BENEFITS TO RAILROAD COMPANIES.

In the preceding discussion of the South Dakota drainage law, we have considered the subject of the notice required by the statute to be given to property owners in general. We now desire to call the attention of the court to the provisions (or want of provisions) in the statute, relating to the notice to be given to railroad companies.

So far as concerns the statutory provisions relating to the notice to be given before a drainage project is entered upon by the Board of County Commissioners under the South Dakota drainage law, there is no difference as respects railroads and other property owners. The only notice, as has been seen, is a general notice to all persons "affected" by the proposed drainage project.

When we come to the matter of the notice given for the equalization of benefits, a singular situation is presented by the provisions of the statute in, that while the law provides for the publication of a notice to the owners of land, there is no provision whatever for the publication of any notice to railroad companies.

The provisions respecting the notice to be given of the equalization of proportion of benefits is found in Section 8463, South Dakota Revised Code, 1919. This section was evidently originally drafted for the purpose of providing a method for the equalization of assessments upon agricultural lands. The method, provided by the statute, for arriving at the assessment and equalization of benefits, is to take some "particular tract as a unit" and then with this tract as a measuring stick to determine, in number of units, the benefits received by the remaining tracts of land. This system is one which is in its nature applicable to agricultural lands, but which cannot well be applied to other classes of property, such as railroads and the property of municipalities. In the case of railroads, the taking of a particular tract of land as the unit, or measuring stick cannot be made to work out successfully unless the taxing authorities are content to assess railroads merely by virtue of the railroad ownership of the tracts of land comprised in the right of way within the assessment area. In other words, the

only way in which the proportion of benefits to railroad property could be determined, under the system provided by the statute, would be to consider merely the area of the right of way and proportion benefits to it the same as to the other agricultural land within the assessment area.

Evidently the legislature, in enacting the South Dakota drainage law, was not satisfied to have railroad companies and municipal organizations pay assessments for the construction of drainage works upon the same basis as the owners of agricultural lands, and in enacting Section 8463, South Dakota Revised Code, 1919, after providing the method for the assessment of the proportion of benefits upon lands by selecting some particular tract as a unit, there was added to the Section (something in the nature of an afterthought) the clause, "the pro- "portion of benefits which any county, city, town or "township may obtain by the construction of such drain- "age to highways or otherwise, and *the benefits which "any railroad company may obtain for its property by "such construction,* shall be fixed and equalized together "with the proportion of benefits to tracts of land." No method of arriving at the assessment and equalization is provided by the statute. The "particular tract as a unit" system is selfevidently inapplicable in such cases but the legislature has provided nothing to take its place. The law gives the Board of County Commissioners the naked power to fix and equalize the proportion of benefits to counties, cities, towns, townships, and railroad companies, but provides no method upon which the assessment and equalization can be based.

The notice of equalization of proportion of benefits, provided by Section 8463, "shall state the route and "width of the drainage established, a description of each "tract of land affected by the proposed drainage and the "names of the owners of the several tracts of land as "appears from the records of the office of the Register of "Deeds, at the date of the filing of the petition, and the "proportion of benefits fixed for each tract of property, "taking any particular tract as a unit, and shall notify "all such owners to show cause why the proportion of "benefits shall not be fixed as stated." This is a notice

directed solely to the owners of tracts of land within the assessment area. It does not purport to be a notice to a county, city, town, township, or railroad company respecting the assessment or the equalization of proportion of benefits upon the property belonging to any of such organizations. The statute authorizes the Board of County Commissioners to assess the "proportion of benefits" which any county, city, town or township may obtain by the construction of drainage to highways or otherwise, but does not provide for the giving of any notice to the municipality affected. With respect to railroad companies, the statute authorizes the Board of County Commissioners to "fix and equalize" the "benefits", but seems to make a distinction between railroad property and other classes of property by using the words "proportion of benefits" with respect to other property, but the term "benefits" with respect to railroad property. This would seem to indicate that it was not the intent of the legislature that railroad companies should be assessed in the same proportionate manner as are agricultural lands, or as are counties, cities, towns or townships.

The fact, however, remains that the legislature of South Dakota has made no provision whatever for the giving of notice to railroad companies, cities, towns, or townships, of the assessment or equalization of benefits supposed to be derived from the construction of the drainage works. It consequently follows that as far as railroad companies, counties, cities, towns, and townships are concerned, the statute provides for no notice whatever, at any stage of the proceeding, of the assessment or of the tax. Even if the South Dakota drainage statute should be held valid as far as respect the matter of notice to the owners of agricultural lands, it is clearly unconstitutional as to railroads and municipalities by reason of its failure to provide for any notice whatever at any stage of the proceedings. It clearly comes within the inhibition of the Fourteenth Amendment and within the doctrine laid down by the Supreme Court in numerous cases.

Central of Georgia Railway Company vs Wright, 207 U. S. 127,

Londoner vs Denver, 210 U. S. 373,
Soliah vs Heskin, 222 U. S. 522,
Turner vs Wade, 254 U. S. 64

The South Dakota drainage statute having failed to provide for the giving of any notice, at any stage of the proceedings prior to the time the tax becomes absolute, to railroad companies or municipalities, any assessment or tax imposed upon each corporation or municipality under the statute is without due process of law and void.

VI.

THE ATTEMPTED ASSESSMENT UPON THE PROPERTY OF APPELLEE WAS ARBITRARY, UNJUST, AND ILLEGAL, AND CONSTITUTES A DISCRIMINATION SO PALPABLE AND ARBITRARY AS TO AMOUNT TO A DENIAL OF THE EQUAL PROTECTION OF THE LAW.

Under the proposed assessment of benefits, out of a total of 32,549.62 units there were assessed against Appellee 1681 units, upon which the assessment of Appellee would be in excess of $15,000. The methods used by the Board of County Commissioners in arriving at these figures is disclosed by the testimony of H. Rettinghouse, a civil engineer employed by the Board of County Commissioners to make a survey of the assessment area, and who made the computations contained in the assessment of benefits adopted by the Board. Mr. Rettinghouse was called by Appellants as a witness and upon the trial testified (Record pp. 350-3951), as follows:

"We used this unit selected as one and compared "the other real estate with it. It was decided by the "Board that the acre in question was worth one hundred "dollars prior to the improvements and that it was "worth one hundred twenty-five dollars subsequent to the "improvements. Therefore the actual value of benefit "to the unit selected was twenty-five dollars. All the "agricultural land was assessed in relation to this unit. "Many of the lands were only 30 or 40 per cent depend-"ing upon the amount of benefit derived, as compared "with this unit, being one hundred per cent. There were "other lands that were as high as three hundred and fifty

"per cent of this unit. I am familiar with the cost of "construction and upkeep of highways. In arriving at "the benefit to the highways within this drainage area "we estimated the benefit in this way. There is a certain "amount of annual maintenance necessary for any road, "and there is more than that amount under flood con- "ditions. That is to say, a road that is periodically "flooded as against a road that never is flooded. The "difference in the estimated cost of maintenance was "capitalized, or represented the interest on a certain "sum of money, and we consider the capitalized portion "as a real benefit. We then, after obtaining that re- "sult after making a great many calculations, taking "into consideration the various locations, some of them "benefitted more than others.

"We divided the amount arrived at by the value of "the unit of $25, thereby obtaining the number of units "as a proportional benefit for these roads. The sum "we divided by the unit represented the capitalized value "to that part of the highway; we applied the same "method to the streets and highways of the City of "Sioux Falls. We did not apply the acreage basis to "the city property, excepting possibly the grounds where "the waterworks are located. In applying the benefit "to the unit and what the Board took into consideration "as elements of benefit to the Milwaukee Railway Com- "pany, we took into consideration the fact that in the "first place there were practically three elements. First "was the right-of-way on the acreage basis, which was "estimated in proportion to the adjacent lands. Second, "that it was possible to shorten or abandon certain "bridges. In order to determine the benefits derived "therefrom is simply a mathematical proposition. It "costs a certain amount of money each year in order "to maintain a bridge, whether it is a pile bridge or a "steel bridge. We know how long these structures will "last. We figure the cost of a bridge and divide it by "the number of years in order to get the amount that "is necessary to be expended each year for replace- "ment. Taking the amount in dollars and cents multi- "plied by the length of the bridge and divide that and "capitalize that at 7 per cent, which is the usual rate

"of interest, and that determines the amount of benefit. "This is the second element. The third element is "the fact that by reason of the flooding of the territory "in which railroads are located, washouts often occur. "We obtained data and from my personal knowledge and "experience I have a very good idea what it costs to re- "pair washouts periodically appearing and we estimated "as close as possible how much it would amount to every "year and capitalized that amount again.

"Again as an additional element, a road-bed is solid- "ified or made stronger by not being subject to floods. "A road-bed that is constantly or for great lengths of "time subjected to submersion is certainly weakened, "and again, so far as humanly possible, we figured the "amount of benefits in dollars and cents and after get- "ting all of these results or capitalized amounts, we di "vided that by twenty-five as our measure and determined "the number of units of benefit. That system and general "method and plan was used to determine the amount "of benefits that each railroad received from these "separate elements."

The statement of Mr. Rettinghouse, the engineer who made the assessment of benefits for the Board of County Commissioners of Minnehaha county, is upon its face sufficient to demonstrate the fact that in arriving at the proportion of benefits to be assessed against Appellee, the other railroad companies, and the city of Sioux Falls, the Board used as a basis for arriving at the assessment a method so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality. The assessment was clearly upon a fanciful view of benefits to be derived by the railroad companies from the drainage project. The basis used was not authorized by any provision of the South Dakota drainage law but was evolved from the inner consciousness of the County Commissioners of Minnehaha county and of the civil engineer employed by them. The basis was so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality. It constituted a dis-

crimination so palpable and arbitrary as to amount to a denial of the equal protection of the law.

We do not deem it necessary to discuss this proposition at further length. In the recent case of *Kansas City Southern Railway Company vs Road Improvement District No. 6*, 256 U. S. 658, this Court has emphatically condemned similar methods of assessment.

We respectfully submit, that even if the South Dakota drainage were constitutional and there were no other valid objections to the proceedings of the Board of County Commissioners of Minnehaha County in the organization of Drainage Ditch No. 1 and 2, and in the construction work done thereunder, the assessment made upon Appellee cannot be sustained for the reason that it is so arbitrary and unjust and so confessedly founded upon a fanciful basis as to deprive Appellee of the equal protection of the law.

VII.

THE DECREE MUST BE SUSTAINED REGARDLESS OF WHETHER THE DRAINAGE DITCH NO. 1 AND 2 BE REGARDED AS AN ORIGINAL DITCH PROCEEDING OR AS A MAINTENANCE AND REPAIR PROPOSITION.

Section 2, ch. 134, Laws of 1907; Section 8459 R. S. 1919, provides for the initiation of the proceedings by filing a petition. Section 4, ch. 134, Laws of 1907, Section 2, ch. 102, Laws of 1919; Section 8461 R. S. 1919, provides for notice of hearing thereof given to property owners, and is the only notice given prior to the establishment of the ditch. This notice is, therefore, jurisdictional. We have already contended that this statute, not requiring a description of the property claimed to be affected, does not satisfy the constitutional requirements of due process of law. All parties affected have a right to be heard upon the question of the establishment of the proposed drainage. They must have notice that such property will be claimed to be affected, otherwise the major step in the proceeding for which they are ultimately bound to pay, has been taken without jurisdiction of the person or property.

If the said Section R. S. 8461 requires a description of the property to be affected, then the notice itself is insufficient. Upon this theory, perhaps, the decision of the trial court was based. The notice of the hearing upon the petition for the establishment of the ditch 1 and 2 refers generally to the lands affected thereby. There is nothing to indicate that the new ditch would extend beyond or occupy a position different, from the old ditches 1 and 2. The evidence shows that there was no change or extension. The lands therefore presumed to be affected by the new ditch, if held to be a new ditch, or by the improvement of the old ditches, could not, in the absence of the description in the notice, be deemed or expected to include other lands than those included within the drainage area of the old ditches 1 and 2. There was no such description and nothing upon which it could have been apprehended that the area was intended to be extended. There was, therefore, want of notice in fact to the owners of property not included within the original drainage area. The undisputed evidence is that a considerable property of the Appellee not included in the original area, is attempted to be assessed under the guise of a new drainage ditch and this without any notice that the old drainage area was to be extended. There was, therefore, a failure to give notice, jurisdiction was not acquired of the proposed added area affected by the injunction and decree of the trial court. The reference made in the Appellants' brief to the Gilseth case may be disposed of by this situation; the lands involved in the Gilseth case were in the original drainage area, while the assessments sought here to be enjoined by the court affect areas not included within such area. The court by its decree in this case excepted from the effect of the decree the right to make an assessment upon the railroad property within the original drainage area.

The court was, therefore, justified in finding that the proposed assessment upon property not included within the original drainage area was an afterthought for the purpose of raising money. It matters not whether such determination be upon the theory that this was an attempted establishment of the new ditch or whether such proceedings for the new ditch was a mere subterfuge for

raising money to repair and improve the old ditch. The decision of the court equally sustains either theory.

As the court properly determined, no attempt was made to take the statutory steps for the repair, improvement or continuation of the old ditch, but an attempt was made to follow statutory requirements to establish a new ditch—hence it matters not whether this was a mere subterfuge to raise money or any ineffectual attempt to establish a new ditch.

Appellants challenge the record on account of the insufficiency of the facts to support the findings and conclusions of the trial court affirmed by the court of appeals. The proposition as to the amount in controversy, that the proceedings and proposed assessments are arbitrarily determined without notice of hearing in advance of a determination of benefits upon a hearing, as well as the amount in controversy, is fully presented and made to appear from Exhibit B attached to bill of complaint, from which it appears that before any notice of equalization or the apportionment of benefits, it had already been arbitrarily determined by the Board that the different classes of property as different in character and as differently affected, if at all, as the agricultural lands from either by the so-called drainage should be assessed a certain percentage of the cost. There was no rule of comparisons prescribed by statute, or adopted by the Board, but it had already been determined that 14.5% should be assessed against the railroads, 33.4% against farm lands, 1% on city lots, 9.7% on city of Sioux Falls and 16.5% on the Northern States Power Company. This was a percentage of the $309,221.40 to be raised. It was then proposed that by Exhibit C attached to the bill of complaint that the various railroads should be assessed upon certain property in specific amounts. Upon this a hearing was proposed to be had. This situation is fairly conceded by argument of Appellants on page 80, paragraph III wherein Appellants say: "But passing that, it is "plain on this record so far as the present appeal is "concerned there is more than $1,000.00 in controversy "* * *. It is admitted that no assessment has yet been "made and not a dollar of tax yet collected. There has "been an expenditure of over $250,000; drainage warrants

"for that amount are outstanding, and they must be "paid if at all by collecting the assessment that this in- "junction stopped. The tentative apportionment against "the Appellees is roundly, $112,000. (Page 13 in N., P., "R., S., O. and M.) But on the point under discussion "little attention need be paid that fact. There is at this "time more than $1,000.00 in dispute no matter how this "$112,000.00 is treated." In other words, Appellants concede that by the apportionment already made, the sum of $112,000.00 must be raised upon the property of the Appellees and that by no course of reasoning can it be determined that less than $1,000.00 is involved in each of the appeals.

By the same course of reasoning, not only had the amount been determined, but also a division of the expenses as between different classes of property. The amount to be raised upon railroads had already been determined as 14.5% of the entire expense, regardless of benefits. However that be apportioned, neither could be less than $1,000.00. The testimony shows the dissimilarity of the property and the theory of the arbitrary assessment so that it clearly appears from the pleadings and the proof that not only more than $3,000.00 is involved but that the amount to be borne by the railroads had already been determined in advance and the apportionment, according to Appellants' concession, is to be made among the railroads of the 14.5%. Consequently these Appellees have been deprived of their right to be heard upon the controlling and important question, that is, as to the amount and basis of the assessment against railroads.

VIII.

THE DISTRICT COURT POSSESSED JURISDICTION TO ENTERTAIN AND DETERMINE THIS SUIT.

Counsel for Appellants have filled a great portion of their brief with arguments upon objections to the jurisdiction of the District Court in this suit. We do not deem it necessary to take up these various objections and discuss them *seriatum*. The questions at issue, involving as they do the constitutionality of the Federal

Constitution, together with the amount involved and the diversity of citizenship, are amply sufficient to sustain the jurisdiction of the court.

Counsel for Appellants strenuously contend that Appellee should have waited until after the Board of County Commissioners of Minnehaha county had finished the equalization of benefits before instituting this suit. This case is, however, not one in which any such delay of proceedings was necessary. The law, under which the Board of County Commissioners was proceeding, was unconstitutional. The Board was a trespasser from the very commencement of the assessment proceedings. After the Board of County Commissioners had committed one illegal act, in making the assessment of benefits, it was certainly not incumbent upon Appellee to wait before instituting legal proceedings until after the Board had committed further illegal acts. Jurisdiction to maintain a suit to restrain the commission of a tort becomes fixed as soon as the first tortuous step has been taken by the tort feasor. It is not necessary for the person injured to wait until after the threatened damage has been completed. The Board of County Commissioners of Minnehaha county invaded the rights of Appellee when it made the assessment of benefits, and the right of action then became complete.

In our view of the issues involved in this case, the points which we have raised in the foregoing discussions in this brief are a sufficient answer to all questions concerning the jurisdiction of the court.

IX.

APPELLEE IS NOT ESTOPPED BY ITS ACTS FROM MAINTAINING THIS SUIT.

In their brief, counsel for Appellants make a somewhat elaborate attempt to show that Appellee is estopped from maintaining this suit. It was in evidence that the railroad tracks of the Appellee extend through the flats north of the city of Sioux Falls, and are in some places not far distant from the drainage ditch. It also appeared in the evidence that Appellee is the owner of a spur track to the South Dakota penitentiary, which is situated not

far from the place where the spillway is constructed, and that freight used in the construction of the spillway was delivered to the workmen building the spillway at the terminus of this spur track at the penitentiary. It further appears that one of the contractors, employed by the Board of County Commissioners to do dredging upon the ditch, shipped his dredging machines over the lines of railroad of the Appellee from the city of Sioux Falls to Renner, a station about five miles north of Sioux Falls. It further appears that upon one occasion, Appellee transported, as a common carrier, a gang of workmen, employed by the contractors engaged upon the construction of the drainage works, to the point where the flat was flooded north of Sioux Falls, and stopped the passenger train to let the gang off at the place where they were to do work, and stopped again in the evening to take the gang on board, and bring them back to Sioux Falls. The foregoing are all of the facts upon which counsel seek to base their theory of estoppel.

All the evidence of estoppel contained in the records amounts to is, first, that Appellee operates a railroad through the flats upon which the ditches were constructed, and, second, that Appellee, as a common carrier, transported men and materials used in the construction of the works. There is not a scintilla of evidence that Appellee or any of its officers ever consented to the drainage construction or approved it in any manner whatsoever. It is, therefore, a sufficient answer to the estoppel proposition, that there is no evidence of any facts which would create an estoppel.

A further answer to the estoppel plea is this: Under the South Dakota drainage law, no notice was required to be given Appellee until the assessment of benefits had been made. Up to that time, Appellee had no knowledge that its property, situated outside of the original assessment areas of Drainage Ditch No. 1 and of Drainage Ditch No. 2, was "affected" by the drainage construction, or would be assessed for the cost thereof (it will be remembered that in the decree in this case, an injunction was issued in favor of Appellee only as to its property outside of the original assessment areas, and that as to the property within such areas the decree is

without prejudice to the rights of Appellee. In this proceeding, therefore, only the property outside of the original assessment areas is to be taken into consideration). We do not concede that, under the South Dakota statute, any notice was ever given to Appellee that an assessment had been made upon its property for the statute, as has been seen, does not provide for the giving of any notice whatever to railroad companies. If, however, it should be conceded, for the sake of argument, that the notice published by the Board of County Commissioners, after the assessment had been made, was a notice to Appellee, it was the first notice that Appellee had ever received. All of the acts under which an estoppel is claimed by Appellants were done during the time of the construction work and long prior to the making of the assessment of benefits and to the publishing of the equalization notice.

We respectfully submit that even if the acts set forth in the record were sufficient to constitute an estoppel upon the part of Appellee that such acts could not constitute an estoppel for the reason that, at the time they were done, Appellee had received no notice that its property within the new territory sought to be assessed was within the assessment area of Drainage Ditch No. 1 and 2, and had no knowledge that an assessment was in contemplation. We deem it unnecessary to discuss the estoppel proposition at further length.

X.

IN CONCLUSION

In the record of this case there is ample evidence of the greatest ignorance, ineffeciency, and extravagance upon the part of the Board of County Commissioners of Minnehaha county in the construction of the spillway, retaining walls, dams, and other works under the organization known as Drainage Ditch No. 1 and 2. Plans for the work were adopted and then the adoption rescinded. Plans and specifications for the construction of a spillway were obtained and bids advertised for and received for the construction in accordance with the plans. The bids were rejected upon the ground that they were too high, the plans were then thrown into the waste basket and contractors were employed to construct a spillway upon

the cost-plus plan, the contractors to receive compensation for the material and labor used and, in addition, a profit of nine per cent. The construction of the spillway was entered upon without any plans therefor being made, and the plans were drawn after the spillway had been completed, or practically completed. The cost of the spillway so constructed was approximately $150,000, or more than three hundred per cent of the amount of the bids which were rejected by the Board as being too high. The spillway and other works, when completed, have failed to accomplish successfully the drainage of the flats north of the city of Sioux Falls. The property owners in the flats are in practically the same, or possibly in a worse condition, than they were prior to the original construction of Drainage Ditch No. 1 and of Drainage Ditch No. 2. The works constructed, under the organization of Drainage Ditch No. 1 and 2, simply operate to retain the surface water upon the flats and not to drain it off. They are successful in preventing the diversion of the channel of the Big Sioux river and in preventing the draining of the gravel bed from which the city of Sioux Falls obtains its water supply. Those two objects have successfully been accomplished but the same results could have been attained by placing, at a trifling expense, earthwork dams in proper places along the course of Drainage Ditch No. 1 and of Drainage Ditch No. 2. The spillway and other works, as completed in Drainage Ditch No. 1 and 2, have operated to destroy the efficiency of the original ditches as drainage propositions, but have accomplished nothing that could not have been accomplished at a trifling expense by simply abandoning the old ditches and preventing the flow of water through the bluff and into the Big Sioux river below the falls.

The Board of County Commissioners of Minnehaha county, in the work done by them on Drainage Ditch No. 1 and 2, seem to have acted at haphazard and without any well defined plan of procedure. The one thing which they have accomplished successfully has been to expend upwards of $250,000 upon works which are useless as a drainage proposition, and, with interest, the entire indebtedness which has now accumulated is in excess of $300,000. The intervening Appellants, who hold

the drainage ditch warrants issued by the Board of County Commissioners of Minnehaha county upon Drainage Ditch No. 1 and 2, are certainly in an unfortunate position. That they are in a fair way to lose their investment is, however, no reason why Appellee, an "innocent bystander," should be "made the goat" and forced to pay for the errors, mistakes, and wild extravagances of the Board of County Commissioners of Minnehaha county. It was not through any fault of Appellee that Drainage Ditch No. 1 and 2 was organized and the spillway and other works constructed. It is in no manner responsible for the acts of the Board of County Commissioners or for the mistakes of judgment of the intervening Appellants, in investing in the warrants.

In conclusion, we submit, that for the reasons which we have hereinbefore set forth, the South Dakota drainage law is unconstitutional under both the federal and the state constitutions; that the proceedings under which Drainage Ditch No. 1 and 2 was organized were illegal and void; that the work done under such organization was without authority of law; that the attempted assessment upon the property of Appellee is founded upon a fanciful, arbitrary, and illegal basis; that the District Court possessed jurisdiction to hear and determine this suit; and that, for these and the other reasons hereinbefore set forth, the decree of the District Court and the decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

PROVISIONS OF SOUTH DAKOTA CONSTITUTION

SECTION 2 OF ARTICLE VI.

§ 2. No person shall be deprived of life, liberty or property without due process of law.

SECTION 13 OF ARTICLE VI

§ 13. Private property shall not be taken for public use, or damaged, without just compensation as determined by a jury, which shall be paid as soon as it can be ascertained, and before possession is taken. No benefit which may accrue to the owner as the result of an improvement made by any private corporation shall be considered in fixing the compensation for property taken or damaged. The fee of land taken for railroad tracks or other highways shall remain in such owners, subject to the use for which it is taken.

SECTION 6 OF ARTICLE XXI

§ 6. The drainage of agricultural lands is hereby declared to be a public purpose and the legislature may provide therefor, and may provide for the organization of drainage districts for the drainage of lands for any public use, and may vest the corporate authorities thereof, and the corporate authorities of counties, townships and municipalities, with power to construct levees, drains and ditches, and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this state, by special assessments upon the property benefited thereby, according to benefits received.

APPENDIX B

SOUTH DAKOTA DRAINAGE STATUTES

(NOTE: The section numbers at the beginning of each paragraph are those of the South Dakota Revised Code of 1919. The references at the end of each paragraph are to the Session Laws of the various years. The paragraphs as printed constitute the law as it stood at the time of the transactions involved in this suit.)

§ 8458. POWER OF COUNTY COMMISSIONERS. The Board of County Commissioners, at any regular or special session, may establish and cause to be constructed any ditch or drain; may provide for the straightening or enlargement of any watercourse or drain previously constructed, and may provide for the maintenance of such ditch, drain or watercourse whenever such ditch, drain or watercourse shall be conducive to the public health, convenience or welfare, or whenever the same shall be for the purpose of draining agricultural land. (§ 1, ch. 98, 1905; § 1, ch. 134, 1907).

§ 8459. PETITION. Such board shall act only upon a written petition signed by one or more owners of land likely to be affected by the proposed drainage. Such petition shall set forth the necessity for the drainage, a description of the proposed route by its initial and terminal points and its general course, or by its exact course in whole or in part, and a general statement of the territory likely to be affected thereby. The petition shall be accompanied by a bond with sufficient sureties to be approved by the county auditor, conditioned to pay all expenses incurred in case the board does not grant the petition or the same is denied on appeal. Such petition may be presented at any regular or special meeting of the board, and, if sufficient in form, shall be ordered filed with the county auditor. (§ 2, ch. 98, 1905; § 2, ch. 134, 1907).

§ 8460. INSPECTION OF PROPOSED ROUTE. It shall be the duty of such board to act promptly upon all drainage petitions. Upon filing such petition the county auditor shall transmit a copy thereof to the state engineer, who, together with the board of county commissioners shall as soon as practicable, inspect the proposed route and, if in the opinion of such board and the state engineer it is necessary, the board shall cause a survey of the proposed drainage to be made by such competent surveyor as such board may select, but such survey shall be under the general supervision of the state engineer. Such survey shall primarily be for the purpose of aiding the board in determining the necessity of the proposed drainage, but may be a complete survey such as will be required for the construction of the proposed drainage and

assessment of its cost, or as much less as the board may require. Such survey may extend to other lands than those affected by the proposed drainage for the purpose of determining the best practical method of draining the entire section of country of which the lands proposed to be drained, or a portion of them, are a part. For the purpose of inspection or surveys, the county commissioners, surveyors or their employes may enter upon any lands traversed by the proposed drainage or in their judgment likely to be affected thereby. The county auditor shall promptly furnish the state engineer with a copy of the surveyor's report mentioned in the succeeding section and of all maps and plans filed by such surveyor and also with a copy of such further files as the state engineer may ask for. In case the drainage is established the preparation of plans and specifications upon which the contract of construction is to be awarded and also the work of construction, shall be under the supervision of the state engineer. It shall be the duty of the state engineer to render such assistance and advice to the board of county commissioners in regard to such drainage as the duties of his office will permit and he shall be reimbursed by such board for his expenses incident thereto; provided, that in case of minor ditches the state engineer shall not be required to attend with the board of county commissioners at the first inspection, nor to perform subsequent services if in his judgment it shall not be necessary for him so to do. (§ 3, ch. 98, 1905; § 3, ch. 134, 1907; § 1, ch. 102, 1909).

§ 8461. SURVEYOR'S REPORT — NOTICE OF HEARING. The surveyor shall report in writing to the board of county commissioners and his report shall be filed with the petition. After personal inspection or after the receipt of the surveyor's report the board shall determine the exact line and width of the ditch, if the same shall not be fixed in the petition, and shall file its determination with the petition. The board shall then fix a time and place for the hearing of the petition and shall give notice thereof by publication at least once each week for two consecutive weeks in a newspaper of the county, to be designated by the board, and by posting copies of such notice in at least three public places near the route

of the proposed drainage. Such notice shall describe the route of the proposed drainage and the tract of country likely to be affected thereby in general terms, the separate tracts of land through which the proposed drainage will pass and give the names of the owners thereof as appears from the records of the office of the register of deeds on the date of the filing of the petition, and shall refer to the files in the proceedings for further particulars. Such notice shall summon all persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed, and shall summon all persons deeming themselves damaged by the proposed drainage or claiming compensation for the lands proposed to be taken for the drainage to present their claims therefor at such hearing. (§ 4, ch. 98, 1905; § 4, ch. 134, 1907; § 2, ch. 102, 1909).

§ 8462. HEARING ON PETITION. At such hearing any person interested may appear and contest the statements of the petition and matters set forth in the surveyor's report and the finding of the board as to width and route. The petitioners in like manner may be heard in support of the petition. After full hearing the drainage may be established along the line set forth in the petition or in the finding of the board prior to the hearing, or the board may vary the route thereof, or its width, as deemed practicable or necessary. If the board deems it best to vary the route, or to materially change the initial or terminal points of such proposed drainage so that it will pass through other lands than those described in the notice of hearing, or to increase the width of lands to be taken for the proposed drainage, the board shall adjourn the hearing and give the owners of such lands notice as in case of the original hearing. No open ditch shall be constructed within the limits of any public highway except where the topography of the country makes such construction advisable and in such case the ditch shall be located at a sufficient distance from the center of such highway to permit a roadway of standard width being constructed. If the proposed drainage does not give sufficient fall to drain the lands sought to be drained or will not properly take care of the waters collected by

such drainage, the same shall be extended so as to secure the drainage or properly dispose of the water. The hearing in any such case shall be adjourned and notice given to all parties newly affected as in case of the original hearing. When the board of county commissioners shall have fully heard and considered such petition, and all matters in opposition to or in support of the same, it shall, if it finds the proposed drainage not conducive to the public health, convenience or welfare, or not needed or practicable for the purpose of draining agricultural lands, deny such petition, the petitioners to be jointly and severally liable for the costs of the proceeding, the same to be recovered in a civil action. If it finds the drainage proposed or any variation thereof conducive to the public health, convenience or welfare, or necessary or practicable for draining agricultural lands, it shall establish the drainage and shall assess the damages sustained by each tract of land or other property through which the same shall pass and the damages as compensation for the land taken for the route of such drainage. Any person interested may be heard in the matter of damages or compensation for land and the determination of the board of county commissioners shall be final unless an appeal therefrom, as provided in this article, shall be taken, failure to prosecute such appeal or to appear and contest an award of damages by the board to be deemed conclusively a waiver of any such damages or compensation for land taken or of any claimants right to have the same assessed by the jury. Such drain shall be given a name and the proceeding thereafter taken shall be recorded and indexed in a book kept for that purpose in the auditor's office. (§ 5, ch. 98, 1905; § 5, ch. 134, 1907; § 3, ch. 102, 1908; § 1, ch. 205, 1917).

§ 8463. EQUALIZATION OF BENEFITS. After the establishment of the drainage and the fixing of the damages, if any, the board of county commissioners shall fix the proportion of benefits of the proposed drainage among the lands affected, and shall appoint a time and place for equalizing the same. Notice of such equalization of proportion of benefits shall be given by publication at least once each week for two consecutive weeks in a newspaper of the county to be designated by the

board, and by posting copies of such notice in at least three public places near the route of the proposed drainage. Such notice shall state the route and width of the drainage established, a description of each tract of land affected by the proposed drainage and the names of the owners of the several tracts of land as appears from the records of the office of the register of deeds at the date of the filing of the petition and the proportion of benefits fixed for each tract of property, taking any particular tract as a unit, and shall notify all such owners to show cause why the proportion of benefits shall not be fixed as stated. Upon the hearing of the equalization of the proportion of benefits, the board of county commissioners shall finally equalize and fix the same according to benefits received. The proportion of benefits which any county, city, town or township may obtain by the construction of such drainage to highways or otherwise, and the benefits which any railroad company may obtain for its property by such construction, shall be fixed and equalized together with the proportion of benefits to tracts of land. Benefits to be considered in any case shall be such as accrue directly by the construction of such drainage or indirectly by virtue of such drainage being an outlet for connection drains that may be subsequently constructed. (§ 6, ch. 98, 1905; § 6, ch. 134, 1907; § 4, ch. 102, 1909).

§ 8464. ASSESSMENTS. After the equalization of the proportion of benefits the board may make an assessment against each tract and property affected, in proportion to the benefits as equalized, for the purpose of paying the damages and the cost of establishment thus far incurred or to be incurred. The cost of establishment shall include the costs of the service of the board of county commissioners, surveyors and assistants, plans and profiles, publication and filing, and other fees, interest on bonds issued or to be issued and all other expenses incurred or to be incurred that in any way contributed or will contribute to the establishment or construction of the drainage. At the expiration of thirty days after the making of such assessment, a copy thereof certified by the county auditor shall be filed by him with the county treasurer, but before the same is filed a notice shall be given by the board of the time when the same

will be so filed, by publication at least once each week for two consecutive weeks in a newspaper in the county to be designated by the board and by posting copies of such notice in at least three public places near the route of such drainage. Such notice shall also contain a description of the property assessed, the name of the owner as it appears in such assessment and the amount of each assessment, together with the amount assessed against the county or any city, town, township or railroad company, and shall also give the date when the assessment will become delinquent, together with the amount of penalty which will then accrue and the date from which interest will begin to run.

From the time of filing such certified copy of assessment in the treasurer's office, the same shall be due and payable and shall be valid and perpetual liens upon the respective tracts so assessed against all persons or governments except the state and the United States and, if not paid within ten days, a penalty of five per cent shall attach thereto and such assessment shall bear interest from the date of the order of the assessment at a rate not to exceed eight per cent per annum payable annually. Such assessment shall be paid to and received by the county treasurer and paid over to the holders of the assessment certificates or upon the order of the board of county commissioners. The board of county commissioners may issue separate assessment certificates against each tract assessed for the amount of the assessment thereon, and may sell the same at not less than par value with all accrued interest, or may contract to pay for the construction of such drainage with such assessment certificates or with warrants. Such assessment certificates shall refer to the record in the office of the county auditor of the order of assessment and of the filing of a copy thereof in the county treasurer's office, shall transfer to the holder all interest, claim, or right in or to such assessment, bear the same rate of interest, carry the lien of such assessment and be enforcible as provided by law. Assessments for drainage or installments thereof shall be enforced by the county treasurer by sale of the property at the annual tax sale, provided that no such assessment or installment thereof shall be included in the sale of any

given year unless the same shall have been delinquent on or before August first of each year. The provisions of Chapters 7, 8, 9, Part 9 of this title shall apply to the enforcement of the lien or drainage assessments so far as such provisions are applicable, except that a treasurer's deed issued upon a delinquent drainage assessment shall recite the fact that the title conveyed is subject to all the claims which the state or any political subdivision thereof may have thereon for annual taxes.

Whenever an assessmnet for drainage or an installment thereof has been made against any county, city, town or township, as provided in this chapter, the officers of such county, city, town or township, whose duty it is under the law to make the levy of taxes, shall at the time of the next annual tax levy after the making of such assessment make a levy for drainage purposes of such an amount as shall be necessary to pay such assessment, and return the same to the proper officers as provided by for the other taxes, and such levy and tax shall be enforced and collected in all respects as provided by law for other taxes; provided, that any surplus remaining in any fund at the close of any year may be used by any township to pay and apply on any drainage assessment, as provided herein; provided, further, that in unorganized townships the county commissioners shall be authorized to pay for drainage as provided herein out of any money belonging to such unorganized township, and each succeeding year a like levy shall be made by such authorities until the whole of such assessment for drainage is paid. Instead of making an annual assessment for the purpose of paying the damages allowed in any drainage proceeding and the costs of establishment and construction, the board of county commissioners may issue warrants payable only out of the assessments to be subsequently made, the same to bear interest at a rate not to exceed eight per cent per annum payable annually, and may sell such warrants at not less than the face value thereof and shall with such money so raised pay any damages allowed and cost of establishment and construction. In making assessment for such drainage such warrants and the cost of issuing the same shall be included in the costs of the drainage. (§ 7, ch. 98, 1905; § 7, ch. 134, 1907; § 5, ch. 102, 1909;

ch. 130, 1911, and as amended by § 1, ch. 46, Laws of Second Special Session of the Sixteenth Session of the Legislature of South Dakota 1920).

§ 8465. BIDS—SPECIFICATIONS—CONTRACTS. Whenever sufficient money shall have been collected the damages occasioned by the construction of such drainage and fixed as herein provided shall be paid and thereupon the board of county commissioners shall proceed to construct such drainage and shall let contracts for the construction of the same. Such contracts may require the contractors to take their pay in assessment certificates or in warrants to be thereafter issued. The contract may be for the construction of the entire drainage or for any portion thereof, and shall be let upon competitive bids, the board reserving the right to reject any and all bids. The lowest responsible and capable bidder shall be accepted but if any landowner affected be an equally low, capable and responsible bidder with a nonowner of the lands affected the former shall be preferred. When any contract shall be let the contractor shall give a bond in such sum as shall be approved by the board of county commissioners, conditioned for the faithful performance of his work and full completion of his contract to the satisfaction of such board. For the information of the contractors in bidding upon the proposed drainage, full plans and specifications shall be filed in the office of the county auditor. If in the judgment of the board of county commissioners the entire drainage or any part thereof can be constructed for less money than the amount of any bid submitted therefor, the board may cause such drainage to be constructed, hire the necessary labor and purchase all necessary material for such construction, without letting contracts therefor. Contracts for building bridges or culverts rendered necessary by the construction of such drainage may be let separately and after the drainage is completed. The cost of constructing such bridges or culverts shall be charged in the first instance as part of the cost of drainage and thereafter such bridges and culverts shall be maintained as part of the highway; provided, that the cost of removing, repairing, enlarging or replacing bridges and culverts already existing across the line of a proposed drainage ditch shall

not be charged as a part of the drainage. (§ 8, ch. 98, 1905; § 8, ch. 134, 1907; § 6, ch. 102, 1909; ch. 206, 1917).

§ 8466. BOARD MAY EXTEND TIME FOR COMPLETION OF CONTRACT. The board of county commissioners shall have power to grant a reasonable extension of time for the completion of any contract. When any contract shall not be finished within the time specified or to which it may be extended, such board may in its discretion at any time thereafter relet such unfinished portion of any part thereof after not less than five days' notice thereof to the lowest responsible bidder and shall take security as for the original contract. The cost of completing such parts, over and above the original contract price and the expense of notices and reletting, shall be collected by the board from the first contractor; provided, that in no case shall the board forfeit and annul a contract without five days' notice to the contractor, if found, and if not found then by written notice left at his last known place of residence in the county. (§ 9, ch. 98, 1905; § 9, ch. 134, 1907).

§ 8467. ASSESSMENTS FOR FURTHER COSTS. At any time after the damages arising from the establishment and construction of such drainage are paid and the lands for such drainage are taken, assessments may be made for further costs and expenses of construction. If the contractors are required and agree to take assessment certificates or warrants for their services, assessments need not be made until the completion of the work when an assessment shall be made for the entire balance of cost of construction, including the services of the board of county commissioners, surveyors and assistants, plans and profiles, publication and filing, and other fees, interest on bonds issued or to be issued and all expenses of every kind and nature that contribute to the establishment and construction of the drain and notice of such assessment shall be given by the board of county commissioners in all respects as provided for the first assessment. And such assessment and the certificates issued thereon shall be in like manner perpetual liens upon the tracts assessed, interest-bearing and enforcible as such first assessments and certificates. The board of county commissioners may sell such assessment certificates at not

less than par and thereby raise funds to defray the cost of establishment and construction. If there be no damages to be paid before taking the lands for such drainage, or if the damages have been paid by the proceeds of the sale of warrants only one assessment need be made. In any case, in the discretion of the board, several assessments may be made as the work progresses. Assessments shall be paid to the county treasurer and the money therefrom shall be paid by him to the holders of assessment certificates, or upon the order of the board of county commissioners for the purpose of the particular drainage. (§ 10, ch. 98, 1905; § 10, ch. 134, 1907; § 7, ch. 102, 1909).

§ 8468. ACCEPTANCE OF DRAINAGE BY BOARD. After the work of construction shall have been fully completed and approved by the state engineer, the drainage may be accepted by the board of county commissioners, by order duly made, and payment shall be made therefor unless in the discretion of the board of county commissioners agreement be made for the partial payments; provided, that final payment shall not be made until the expiration of thirty days after the acceptance of the work and in case an appeal has been taken from the order accepting such work final payment shall not be made until the determination of such appeal; provided, further, that no payment shall be made to any engineer whose employment has not been approved by the state engineer, and no payment shall be made upon any contract for the construction of any such drainage project, unless the same shall have been constructed under the supervision of the state engineer; and provided further, that nothing in this section shall apply to minor drainage projects. All claims for compensation or expenses for publishing legal notices or supervising the construction of any such drainage project including the per diem and the mileage of the county commissioners, shall be paid from the general fund of the county, and for all such payments the county treasurer shall reimburse the general fund from the assessments herein provided for. (§ 11, ch. 98, 1905; § 11, ch. 134, 1907; § 8, ch. 102, 1909; ch. 207, 1917).

§ 8469. APPEALS. An appeal shall lie for any final order or determination of the board of county com-

missioners establishing or denying any proposed drainage; fixing damages occasioned by the taking of lands for drainage or caused by such drainage; fixing the proportion of assessments of benefits; or accepting any drainage to the circuit court of the county in which such drainage is located by any one deeming himself aggrieved by any such order or determination. Written notice of such appeal shall be served upon the board of county commissioners and a bond conditioned to pay all the costs of such appeal, in case the contention of appellant be not sustained in some respect, shall be filed in the office of the clerk of courts, to be approved by him in such amount and with such sureties as he deems necessary. Upon the service of such notice and the filing of such bond, the county auditor shall transmit to the clerk of courts the petition and all other papers and records in the matter or certified copies thereof, when the convenience of the auditor's office would be seriously impaired by the transmission of the original records, and such matter shall be heard as an original action in the circuit court. No appeal shall operate as a stay of proceedings by the board of county commissioners, but the court may upon the taking of an appeal, for good cause shown issue an order staying the further proceedings by the board of county commissioners until the hearing and determination of such appeal. Before granting such stay, the court shall require an undertaking in sufficient amount and with sufficient surety to the effect that if the order appealed from be sustained the person upon whose motion the stay is granted shall pay all damages caused by the issuance of such order of stay. Any number of persons interested may join in the same appeal. Appeals shall be in all cases taken within thirty days from the making of the order or determination appealed from. If, on the trial of such action, it be determined that the drainage as petitioned for and established by order of the board is not conducive to the public health, convenience or welfare or is not necessary or practicable for the purpose of draining agricultural lands, the petitioners shall be jointly and severally liable for all the costs thus far incurred. If the contention of the appellant as to the amount of damages or proportion of benefits, the acceptance of the drain-

age, of the practicability of the drainage when the route thereof is varied by the county commissioners over the protest and objection of the petitioners, be sustained in whole or in part, the costs of such trial shall be part of the cost of the drainage. Upon an appeal from an assessment of benefits, the court of jury shall consider not only the relative benefits, to the tract in regard to which the appeal is taken, with reference to the tract taken as a unit, but shall also consider the question as to whether the tract taken as a unit is benefited or not; if benefited, to what extent. (§ 12, ch. 98, 1905; § 12, ch. 134, 1907; § 9, ch. 102, 1909).

§ 8470. ASSESSMENTS FOR MAINTENANCE. For the cleaning and maintenance of any drainage established under the provisions of this article, assessments may be made upon the landowners affected in the proportion determined for such drainage at any time upon the petition of any person setting forth the necessity thereof, and after due inspection by the board of county commissioners. Such assessments shall be made as other assessments for the construction of drainage, certificates may be issued thereon and assessments and certificates shall be liens, interest-bearing, perpetual and enforcible, in all respects as original assessments and may be sold at not less than par by the board of county commissioners, turned over to persons contracting for such cleaning and maintenance or may be collected directly by the board of county commissioners. (§ 13, ch. 98, 1905; § 13, ch. 134, 1907).

§ 8471. ASSESSMENTS PAID IN INSTALLMENTS. The owner of any tract of land against which an assessment for drainage is made, who shall, within thirty days after the making of such assessment, file with the county auditor an agreement in writing that in consideration of the right to pay his assessment in installments he will not make any objections to the illegality or irregularity of his assessment, if any there be, and will pay the same with interest as fixed by the board of county commissioners, shall have the privilege of paying such assessment in ten annual installments, interest payable annually. Assessment certificates shall not issue until after the expiration of the period of filing such agree-

ments with the county auditor, and when issued for assessments to be payable in installments may be issued in coupon form. The first installment shall be payable within ten days after a certified copy of the assessment has been filed, in the office of the county treasurer, and subsequent installments shall be payable one, two, three, four, five, six, seven, eight and nine years from the date of such assessment, respectively, with interest on the whole sum unpaid payable annually at maturity of the several installments. Such subsequent installments shall become delinquent after the expiration of thirty days from the time the same are payable and thereupon a penalty of five per cent shall attach thereto. Provided, that where bonds shall have been issued for the construction of such drainage, as provided in Section 8472, such assessments shall be made payable in installments sufficient to meet the payment on the bonds, as the same shall become due. Payments of assessments may at any time be received and full discharge thereof given by the county treasurer to any property holder, but after issue of bonds, such payment of assessments can be received only according to the terms of such bonds. (§ 14, ch. 98, 1905; § 14, ch. 134, 1907; § 10, ch. 102, 1909).

§ 8472. BOARD MAY ISSUE BONDS. The board of county commissioners, whenever it has ordered the establishment of any drainage, shall have authority by resolution to be spread upon its records, to provide for the issuance of bonds in such sums as may be necessary for the purpose of defraying the expenses incurred or to be incurred in obtaining the right of way or in locating or constructing any such drainage. Such word "expenses" shall be construed to mean and cover every item of cost of such drainage from its inception to its completion, such bonds to be payable only out of the funds to be derived from special assessments upon the lands benefited thereby. Such bonds shall bear interest at a rate not exceeding 7% per annum, payable annually and be payable not exceeding twenty years from issue. Such bonds shall be signed by the chairman of the board of county commissioners and countersigned by the auditor, who shall keep a record of all such bonds. Such bonds shall be issued for the benefit of the particular drainage,

numbered, recorded and indexed in the office of the county auditor, and shall in no case be issued for a sum exceeding the benefits to the lands affected by such drainage. The board of county commissioners shall have the power to negotiate such bonds at not less than par value, as it may deem best for the interest of all persons affected by such drainage, any premium received on such bonds to be credited to the fund of the particular drainage. Such bonds shall contain a recital that the same are issued pursuant to the authority of this article and that they are to be paid out of the funds to be obtained as herein provided. Assessments shall be made upon all of the lands benefited by such drainage for the payment of the principal and interest of such bonds when the same shall become due. Such assessments may be made by separate assessments for installments of interest and principal or in one proceeding with but one set of notices. When the assessments are finally fixed the same shall be certified to the county treasurer by the county auditor, and the money paid in thereon shall be received by the county treasurer and paid over to the holders of such bonds. Separate funds shall be kept by the treasurer for each drainage project, and no funds for one drainage project shall be applied to any other drainage. No county shall be liable for the payment of any bonds issued under this article, but such bonds shall be paid only out of the funds derived from the special assessments herein provided for. Such bonds may be made payable at such times as the board of county commissioners shall find for the best interests of the persons benefited by the drainage, and may be issued for all or any portion of the expenses of such drainage. (§ 15, ch. 98, 1905; § 15, ch. 134, 1907).

§ 8474. FURTHER POWERS OF BOARD. Where proceedings have been had for the establishment of a ditch, drain, levee, or straightening or enlarging of a natural watercourse under the law as heretofore existing, and the improvement has been established and constructed and assessments made upon the land benefited thereby, or upon any portion thereof, for the cost of such improvement, and where the assessment so made cannot for any reason be enforced, the board shall proceed as in all

lands benefited by such improvement in the same manner as if the appraisement and apportionment of benefits had never been made, and it shall proceed in the manner provided in this article, using as a basis the entire cost of such improvement, and in the assessment of such benefits account shall be taken of the amount of assessments, if any, that have been paid by those benefited and credit therefor shall be given accordingly. (§ 17, ch. 98, 1905; § 17, ch. 134, 1907).

§ 8475. DITCH OR DRAIN MAY BE DECLARED NUISANCE. Any ditch, drain or watercourse, which is now or may hereafter be constructed so as to prevent the sufrace and overflow water from adjacent lands from entering the same is hereby declared a nuisance and may be abated as such. (§ 18, ch. 98, 1905; § 18, ch. 134, 1907).

§ 8476. POWERS DEFINED. The powers conferred by this article for establishing and constructing drains shall also extend to and include the deepening and widening of any drains which have heretofore been or may hereafter be constructed, also to straightening, cleaning out and deepening the channels of creeks and streams and constructing, maintaining, remodeling and repairing levees, dykes and barriers for the purpose of drainage; and the board of county commissioners may relocate or extend the line of any drain if the same is necessary to provide a suitable outlet, and shall cause a survey thereof to be made, but no proceedings affecting the rights of persons or property shall be had under this section except upon notice and the other procedure prescribed herein for the construction of drains. (§ 19, ch. 98, 1905; § 19, ch. 134, 1907).

§ 8477. DRAINS UNDER CHARGE OF COUNTY COMMISSIONERS. All drains that have been constructed under any law of this state, or that may be constructed under the provisions of this article, shall, except as otherwise specifically provided, be under the charge of the board of county commissioners and be by it kept open and in repair. In all cases when any completed drain is or may be situated in more than one county, the care of the portion thereof lying within any county is assigned to the board of county commissioners of such county to be

kept open and in repair. The cost of such repairs shall in all cases be assessed, levied and collected in the same manner as provided in this article for the construction of drains originally and in all cases when no assessments of benefits shall have been made, the board of county commissioners having charge of such drain shall make such assessments. (§ 20, ch. 98, 1905; § 20, ch. 134, 1907).

§ 8478. BOARD MAY MAKE RULES AND REGULATIONS. The board of county commissioners may make such rules and regulations on the subject of drainage as it may deem proper, not inconsistent with the provisions of this article, and especially with regard to clearing out and keeping clear the channels of streams and the construction and maintenance of dams thereupon, with reference to their capacity for drainage. (§ 21, ch. 98, 1905; § 21, ch. 134, 1907).

§ 8482. DRAINS FOR TOWNS AND CITIES. The board of county commissioners shall have authority to establish drainage for or including the whole or any part of any city or incorporated town, including cities acting under special charter, as provided in this article, and it shall have the same authority with respect to the assessment of damages and benefits within such city or town as in other cases provided for in this article, and like notices to such city or town with respect to the establishment of such drainage and the apportionment and assessment of damages and benefits shall be given as is required by this article to be given to the owner of property damaged or benefited by the establishment or construction of such improvement. (§ 24, ch. 98, 1905; § 24, ch. 134, 1907).

§ 8485. COMPENSATION OF COUNTY COMMISSIONERS. The county commissioners shall receive for their services four dollars per day for the time actually spent by them in the performance of the duties of their offices under this chapter, publishers of newspapers shall receive for publishing legal notices the same fees as are allowed by law for publishing proceedings of the county commissioners; but the proceedings of the board of county commissioners when acting in any drainage matter under this article shall not be published as a part of its regular proceedings or at all. The county auditor shall charge a reasonable amount, to be fixed by the

board, for services, to be paid into the general fund of the county. Each county commissioner shall have power to administer any oath required in any drainage proceeding. (§ 27, ch. 98, 1905; § 27, ch. 134, 1907; § 11, ch. 102, 1909).

§ 8486. NOTICES, HOW SERVED. Notice by personal service, as of a summons in a civil action, may be given instead of by publication and posting in all cases where notice is provided for in this article. In any case where notice is required under the provisions of this article and any person affected by the drainage has not been notified, either by publication or personally, and a hearing has been had or determination made, such person may be notified personally or by publication and posting, to show cause at a time and place to be fixed by the board of county commissioners, and to make return or claim damages as in case of the original hearing. Any such omitted person may be brought in on such due notice at any stage of the proceeding, or after it has been otherwise concluded. The enforcement of any assessment shall not be enjoined for want of the notice provided for in this article, except pending an application to the board of county commissioners for the determination of such matters as to which any person deems himself not bound because of want of notice. (§ 28, ch. 134, 1907).

§ 8488. DEFECTS IN PROCEEDINGS DISREGARDED. Any defect or irregularity not affecting the substantial rights of parties interested, occurring in any drainage proceeding, shall be disregarded in any action seeking to avoid an assessment or cancel, annul or declare void any such proceeding. And in case the defect is substantial the court shall of its own motion determine the rights of the parties, validate the proceedings and assess the costs as justice may require, if the court shall find cause for such validation or such action should have been taken in the first instance and all parties interested are before the court. (§ 29, ch. 98, 1905; § 30, ch. 134, 1907).

§ 8489. INVALID OR ABANDONED PROCEEDINGS. If any proceeding for the location, establishment or construction of any drain under the provisions of a previous law has been heretofore enjoined, vacated, set aside, declared void, dismissed or voluntarily abandoned,

or if any such proceeding or like proceeding under this article be hereafter enjoined, vacated, set aside, declared void, dismissed or voluntarily abandoned in consequence of any error, defect, irregularity or want of jurisdiction affecting the validity of such proceeding or for any cause, the board of county commissioners may nevertheless proceed to locate a drain or drains under the same or different names and in the same or different locations from those described in the invalid or abandoned proceedings under the provisions of this article. In case any new proceeding be had resulting in the location of a drain in the same or substantially the same location as that described in the invalid or abandoned or dismissed proceeding, and the extent to which the same will contribute to the location, establishment or completion of such new drain. Such value shall be determined at a hearing upon the same notice as the equalization of benefits or assessments, and may at the same time or at any other time, and the notice of such hearing may be a part of the notice of the hearing upon the equalization of benefits or assessments or separate thereform, but the board shall in any case notify all persons interested to show cause why the determination of the board thereupon shall not be final. When finally fixed such value shall become a part of the cost of the new drainage. No use shall be made by the board of county commissioners in the laying out or completion of any drain or ditch under this article of any map, chart, survey, or other work done under any former law or under this article without having paid therefor; and all sums allowed for any work or material or money expended under the provisions of any previous law or under this article shall be paid to the persons who have paid therefor in proportion to the amounts severally paid by such persons. (§ 33, ch. 134, 1907).

IN THE

Supreme Court of the United States

October Term 1925

No. 97.

A. G. RISTY *et al*, as County Commissioners, etc., *et al.*,
Appellants,

vs

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY
Appellee

BRIEF AND ARGUMENT FOR APPELLEE

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Appellee

APPEAL FROM THE CIRCUIT COURT OF APPEALS OF THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR APPELLEE

The Chicago, St. Paul, Minneapolis & Omaha Railway Company, Plaintiff and Appellee, filed its bill in the District Court of the District of South Dakota praying for an injunction. From a decree granting an injunction the Defendants and Appellants appealed to the Circuit Court of Appeals of the Eighth Circuit, in which latter court the decree of the District Court was affirmed. From the decision of the Circuit Court of Appeals the defendants appeal to this Court.

This suit involves the constitutionality of the Drainage Ditch Statute of the state of South Dakota under both the federal and state constitutions and also involves the regularity and validity of proceedings taken under that statute. The facts out of which this suit arises, are, as follows:

STATEMENT OF FACTS

At the election in November, 1906, there was adopted an amendment to the constitution of South Dakota which is known as Section 6 of Article XXI of that constitution and which is as follows:

"§ 6. The drainage of agricultural lands is hereby "declared to be a public purpose and the legislature may "provide therefor, and may provide for the organization "of drainage districts for the drainage of lands for any "public use, and may vest the corporate authorities there-"of, and the corporate authorities of counties, townships "and municipalities, with power to construct levees, drains "and ditches, and to keep in repair all drains, ditches and "levees heretofore constructed under the laws of this "state, by special assessments upon the property bene-"fited thereby, according to benefits received."

The legislature of South Dakota has never enacted any law to carry into effect the powers, conferred upon it by the foregoing constitutional amendment providing for the organization of drainage districts, but has enacted, or attempted to enact various laws vesting the corporate authorities of the several counties of the state with power to construct levees, drains, and ditches and to keep the same in repair by special assessments upon the property benefited thereby.

The first drainage ditch enactment was Chapter 98 of the Session Laws of South Dakota, 1905, which was passed prior to the adoption of Section 6 of Article XXI of the South Dakota constitution. After the adoption of that section a new law was passed which is known as Chapter 134 of the Session Laws of South Dakota, 1907. The 1907 law was amended by Chapter 102 of the Session Laws of South Dakota, 1909. The 1907 law was further amended by Chapters 207 and 208 of the Session Laws of South Dakota, 1917. In 1919 the entire drainage law was recompiled and re-enacted as Sections 8458 to 8507, South Dakota Revised Code of 1919. Further amendments were enacted in 1919 which appear as Chapter 46 of the Session Laws of the First Special Session of the Sixteenth Legislature of South Dakota and by Chapters 193, 194, 195, 196, 197 and 198 of the Session Laws of South Dakota, 1921.

For the convenience of the court we are printing as Appendix A of this brief the portions of the South Dakota constitution, and as Appendix B the portions of the South Dakota laws which bear upon the questions at issue in this suit.

The Big Sioux river has its origin in a lake in the northeastern part of South Dakota and runs thence in a generally southerly direction, and in the eastern part of South Dakota, (of which state it is in places the boundary line) for about 100 miles and empties into the Missouri river at a point a short distance north of Sioux City, Iowa. In its course the Big Sioux river passes through the center of the city of Sioux Falls. It strikes Minnehaha county, in which Sioux Falls is situated, at its north line and flows in a generally southerly direction, but with many bends and curves, for a distance, in a straight line, of twenty-four miles, running in its course two and one-half miles west of the business center of the city of Sioux Falls and south to a point three miles south of the business center. It then flows in an easterly direction for about three miles and then turns north, running through the business center of the city of Sioux Falls and northerly to a point two miles from the business center. It then runs in an easterly direction for several miles when it again resumes its southerly course towards its junction with the Missouri river. The consequence is that at the city of Sioux Falls the river runs like an inverted letter "S," upon the bar of which Sioux Falls is situated.

From a point about five miles south of where the Big Sioux enters Minnehaha county it runs through a valley or flat from two to four miles in width until it reaches a point about three miles southwest of the business center of the city of Sioux Falls. From there on until it reaches the northeastern portion of the city the river is confined by high banks on either side and with no valley interposing between them.

There is comparatively little fall between the point where the Big Sioux river enters the flat about fifteen miles north of the city of Sioux Falls and the northeastern section of the city where the river passes over a series of falls of an aggregate height of more than one hundred feet. The result is that the level of the river bed, as it

passes over the falls in the northeastern portion of the city of Sioux Falls, is over one hundred feet below the level of the river at a point, four miles to the westward, where it passes to the west of the city of Sioux Falls.

About 1878, a dam was constructed for water power purposes across the Big Sioux river within the limits of the city of Sioux Falls a short distance above the falls and, between that dam and the falls, other dams were subsequently constructed, all of which were in existence long prior to any of the transactions out of which this suit arises. These dams for many years have been utilized, without complaint from any source, by the Northern States Power Company and its predecessors, as a source of water power, and upon the dams and power works several hundreds of thousands of dollars have been expended with the consent, express or implied, of the public authorities of Minnehaha county and of the city of Sioux Falls and of the property owners along the Big Sioux river.

The city of Sioux Falls, something over twenty years ago, located its municipal waterworks upon the flat north of the city, between the Big Sioux river where it flows in a southerly direction to the westward of the city and where it flows to the northward after it passes over the falls in the northeastern portion of the city. The flat where the waterworks are situated is a few feet higher than the level of the river bed to the westward of the waterworks plant and more than one hundred feet higher than the level of the river bed to the eastward. Between the two channels of the river (at this point about 3½ miles apart) there is an extensive gravel bed underlying the surface of the ground, which gravel bed is filled with water and is the source from which the city of Sioux Falls obtains its municipal water supply.

For many years, and from in fact shortly after the settlement of Minnehaha county in the late sixties and early seventies, complaints arose in regard to the flooding of the land in the valley of the Big Sioux river north of the city of Sioux Falls. The topography of the country along this valley being level and there being but little fall in the river bed for a distance of nearly thirty miles, between the north end of the flats and the falls of the Big

Sioux river, the surface waters, in times of freshets, would accumulate upon the flats and remain there for several days, and sometimes for weeks, before they gradually flowed off through the narrow river channel south of the city of Sioux Falls and through the city until they reached the falls. This situation was made still worse by the construction of the dam upon the river above the falls in 1878 which hindered still further the passage of the water along the river bed before it reached the falls. As the state of South Dakota became more and more densely settled in the counties along the Big Sioux river north of Minnehaha county, numerous drainage ditches were established, the effect of which was still further to accelerate the flow of surface water during freshets and to cause a still greater volume of water to accumulate upon the flats north of the city of Sioux Falls.

In December, 1907, the Board of County Commissioners of Minnehaha county, purporting to act under the authority of Chapter 134 Session Laws of South Dakota, 1907, established a drainage ditch known as Drainage Ditch No. 1. This ditch was some three miles in length and extended, from a point on the Big Sioux river below the falls, northward to a point on the flat north of the city of Sioux Falls. In 1910, the Board of County Commissioners, again purporting to be acting under the authority of Chapter 134 of the Session Laws of South Dakota, 1907, as amended by Chapter 102, Session Laws of South Dakota, 1909, established a second ditch, known as Drainage Ditch No. 2, which commenced at the north end of Drainage Ditch No. 1 and extended in a northerly direction for about twelve miles.

At the point Drainage Ditch No. 1 empties into the Big Sioux river below the falls it passed over a hill in a descent of about one hundred feet. The bottom of the ditch was covered along this descent with concrete, making a spillway through which the water accumulating upon the flats could run to reach the channel of the Big Sioux river below the falls.

Drainage Ditch No. 1 and Drainage Ditch No. 2 operated more or less successfully in draining the flats until the spring of 1916 at which time, during a somewhat heavy rainfall, the concrete bottom of Drainage Ditch No.

1, (or its spillway) washed out and the water began cutting a channel through the hill.

The fact that the concrete spillway had washed out did not in any manner decrease the efficiency of Drainage Ditch No. 1 and Drainage Ditch No. 2 as drainage propositions. In fact, the washout of the spillway made them still more efficient for draining purposes, and if they had been left alone they would very speedily have settled the question of drainage for the lands upon the flats. The effect of the washout was to open a passage for all of the water which accumulated upon the flats into the channel of the Big Sioux river below the falls and this channel was amply sufficient to have taken care of all of the water which ever accumulated upon the flats. In fact, it was a perfect success as a drainage proposition.

Unfortunately, while Drainage Ditch No. 1, after its spillway was washed out, succeeded in doing all in the way of drainage that the owners of the lands upon the flats desired to have done, it seriously affected other interests. If the water had been allowed to go without hindrance through the new channel it would, within a very short time, have diverted the entire course of the water in the Big Sioux river and would have formed a new channel for the river across the flats north of the city of Sioux Falls, in which channel all of the water coming down the river could have flowed into the channel below the falls without passing around and through the city of Sioux Falls and over the falls, thus cutting off about twelve miles of the river channel. The further effect would have been to destroy the waterpower formed by the dams across the Big Sioux river in the city of Sioux Falls above the falls, as the only water which would have flowed in the Big Sioux river channel through the city of Sioux Falls and over the falls would have been the water from Skunk creek, a tributary of the Big Sioux river, emptying into that stream south of the city of Sioux Falls. Another effect of allowing the river to run through its new channel would have been to destroy the municipal water plant of the city of Sioux Falls by draining the water from the gravel bed from which the city obtained its water supply.

After the spillway at the outlet of Drainage Ditch No. 1 had washed out in March, 1916, various plans were

proposed looking toward the control of the water which flowed through the ditch. Many conferences were had between the Board of County Commissioners and the representatives of the various interests affected. The Appellee was not represented at any of these conferences and never took any part in any manner in them or in the subsequent proceedings.

In October, 1916, the Board of County Commissioners took proceedings by which they attempted to establish a new ditch project which they named "Drainage Ditch No. 1 and 2." Thereafter, all proceedings with respect to Drainage Ditch No. 1 and with respect to Drainage Ditch No. 2 were abandoned and all subsequent work was done by the Board of County Commissioners upon the new project, "Drainage Ditch No. 1 and 2."

The Board of County Commissioners, after attempting to organize Drainage Ditch No. 1 and 2, proceeded to construct additional ditches, cut-offs, and dams in the flats above the city of Sioux Falls, and at the former outlet of Drainage Ditch No. 1, to construct a spillway, and other water retaining works for the purpose of controlling the flow of the water through the ditches. This work was done by the Board of County Commissioners without any regard to the requirements of the South Dakota drainage statutes and without having first had plans therefore prepared and approved by the state engineer. The most of the work was done by the board without letting a contract therefor and upon the cost-plus plan. The result was, that at the end of the construction period, the cost of the work done by the Board of County Commissioners upon Drainage Ditch No. 1 and 2 had amounted to a sum in excess of $250,000, of which upwards of $150,000 was expended upon the spillway and other water retaining works at the outlet of the ditch. For the amount expended, the Board of County Commissioners issued warrants upon the Drainage Ditch No. 1 and 2. These warrants were taken by the laborers and material men employed upon the construction work and were in most instances discounted to the local banks in Minnehaha county.

After a number of abortive attempts to levy an assessment for the purpose of raising the money to pay the warrants issued for the work done upon Drainage Ditch No.

1 and 2, the Board of County Commissioners, in June, 1921, adopted a notice of time and place for equalizing the proportion of benefits for the construction of the work on Drainage Ditch No. 1 and 2, in which notice the proportion of benefits assessed against Appellee was 839.45 units out of a proposed total of 32549.62 units, upon the basis of which proportion the assessment against Appellee and its property would be in excess of $7,500.

The plaintiff and Appellee brought this suit to enjoin the making of any assessment upon its property for the work done upon Drainage Ditch No. 1 and 2. A temporary injunction was granted *pendente lite*. The defendants named in the bill were the Board of County Commissioners of Minnehaha County, the Auditor, and the Treasurer of that county. Subsequently, the various banks and other persons holding drainage ditch warrants filed a petition for leave to intervene in the suit. This petition was granted and answers were filed both by the defendants and by the intervenors. Upon the hearing of the suit upon its merits, a final decree was entered enjoining the Board of County Commissioners from making any assessment for the expense of the work done under the proceedings establishing Drainage Ditch No. 1 and 2. The decree by its terms was without prejudice to the right of Appellee to contest any assessment upon the property owned by it which had formerly been assessed for Drainage Ditch No. 1 and Drainage Ditch No. 2. (*Chicago, Rock Island & Pacific Railway Company vs Risty*, 282 Fed. 364.)

In its bill Appellee set up the facts concerning the construction of Drainage Ditches No. 1 and No. 2 and the subsequent construction of a spillway and attacked the constitutionality of the South Dakota Drainage Statute in the following allegations:

"That said purported statute of the state of South "Dakota 'Exhibit A' hereto, is unconstitutional and void, "in that the same is in violation of Section 2 of Article "VI, of the Constitution of the State of South Dakota, "and in that the same is in violation of the Fourteenth "Amendment of the Constitution of the United States; "that said Statute, 'Exhibit A', is further void and un- "constitutional in that the same provides no fixed and

"determinable method or rule for the apportionment of "benefits upon the property and property owners situat- "ed within the drainage area, and especially in that said "purported statute furnishes no fixed or determinable "basis for the apportionment of benefits upon the prop- "erty of railroad companies and other corporations, and "upon the property of municipal and quasi-municipal cor- "porations, and upon platted property in cities and vil- "lages. Said purported law, 'Exhibit A', is further un- "constitutional and void in that the same provides for an "assessment against property without the right of the "property owner to be heard thereon and without notice "of any character to the property owner; that if said ap- "portionment of benefits be made as threatened by the "said Board of County Commissioners of said Minnehaha "County, and as is provided in said notice, 'Exhibit C', "the same will constitute the taking of the property of "plaintiff and of the other property owner affected by "said notice without due process of law; that a cloud will "be placed upon the title of the plaintiff to its real prop- "erty situated within said drainage area affected by "said notice, 'Exhibit C' and that there will result a mul- "tiplicity of suits and that plaintiff and other property "owners affected will suffer irreparable injury." (Rec- ord, p. 15).

The bill also attacked the acts of the Board of County Commissioners of Minnehaha County in its proceedings relative to the construction of the spillway and other drainage works as being without jurisdiction on account of the unconstitutionality of the South Dakota Drainage Statute and also on account of such proceedings not being had in accordance with the provisions of the Statute. (Record, pp. 14-15). The apportionment of benefits made against the property of Appellee was further attacked as exorbitant, disproportionate to the assessment of other property and made upon an arbitrary and discriminatory basis. (Record, pp. 72-73).

In their answer, Appellants took issue upon the unconstitutionality of the South Dakota Drainage law and specifically set up the establishment by the Board of County Commissioners of a new ditch project under the title of "Drainage Ditch No. 1 and 2."

Upon the trial in the district court the issues involved were, under the pleadings:

1. The constitutionality of the South Dakota Drainage Ditch Statute.

2. The regularity of the proceedings of the Board of County Commissioners of Minnehaha county under the Statute.

3. The proper construction to be given to the provisions of the South Dakota Drainage Statute.

There was practically no dispute as to the facts out of which this suit arises. It was admitted by all parties to the controversy that originally the Board of County Commissioners of Minnehaha county had established two drainage ditches known respectively as Drainage Ditch No. 1 and Drainage Ditch No. 2. It was also conceded that after the spillway, at the outlet of Drainage Ditch No. 1, had been washed out, the Board of County Commissioners established a new ditch project known as Drainage Ditch No. 1 and 2.

This suit was one of six cases involving this same ditch project, but the positions taken by the plaintiffs in the various cases differed upon the proposition as to whether Drainage Ditch No. 1 and 2 was a new and independent proposition or whether it was merely a project for the maintenance and repair of Drainage Ditch No. 1 and Drainage Ditch No. 2 and consequently a continuation of those two propositions. In all of the six cases the contention of counsel for Appellants was that Drainage Ditch No. 1 and 2 was a new and independent proposition. This position was contested by plaintiffs in some of the cases who took the position that it was merely a maintenance and repair project. In the case at bar, the plaintiff (Appellee in this court) was content to coincide with the position taken by the defendants (Appellants in this court) and to base its right to an injunction upon a state of facts in which it conceded that Drainage Ditch No. 1 and 2 was a new and independent ditch proposition and not a continuation of the old Drainage Ditch No. 1 and Drainage Ditch No. 2.

In the District Court injunctions were granted to the plaintiffs in all the six cases, but in his opinion filed in the District Court, the District Judge took the position that

Drainage Ditch No. 1 and 2 was merely a maintenance and repair project and a continuation of Drainage Ditch No. 1 and Drainage Ditch No. 2. (*Chicago, Rock Island & Pacific Railway Company vs Risty*, 282 Fed. 364).

While we contend in this court, as we did in the Circuit Court of Appeals, that the decree of the District Court was properly entered and should be affirmed, we do not act as the defenders of the decree upon the grounds upon which it was based by the District Judge. The decree was, in our view of the controversy, properly entered, but the same decree should have been entered had the court been of the opinion that Drainage Ditch No. 1 and 2 was an independent and original ditch proposition and not a continuation and repair project of Drainage Ditch No. 1 and Drainage Ditch No. 2. In this position we do not coincide with the views expressed by counsel for the Appellees in other of the six cases now before this court. We accept the position of counsel for the Appellants that Drainage Ditch No. 1 and 2 was an original and independent ditch proposition and upon that basis shall proceed with our argument in support of the decree of the District Court and the decision of the Circuit Court of Appeals.

An appeal was taken by the defendants and by the intervenors to the Circuit Court of Appeals for the Eighth Circuit, in which court the decree of the District Court was affirmed. *Risty vs Chicago, Rock Island & Pacific Railway Company*, 297 Fed 710. The defendants and intervenors then filed a petition in this Court for a writ of certiorari and, at the same time, took this appeal. The application for a certiorari was denied. *Risty vs Chicago, St. Paul, Minneapolis & Omaha*, 266 U. S. 622. The case is now before this court upon the appeal.

The foregoing being the facts in this suit, we submit on behalf of the Appellee, the Chicago, Milwaukee & St. Paul Railway Company, the following:

BRIEF AND ARGUMENT

I.

THE SOUTH DAKOTA DRAINAGE LAW IS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND IS THEREFORE UNCONSTITUTIONAL.

The first proposition which we desire to present for the consideration of the Court is that the entire South Dakota drainage law is unconstitutional, our contention being that it is in violation of the "due process of law" clause of the fourteenth amendment to the federal constitution. The consideration of this question involves an analysis of the provisions of the South Dakota drainage statute as it existed at the time the Board of County Commissioners of Minnehaha county attempted to establish Drainage Ditch No. 1 and 2 and did the work thereunder.

The first statutory step in the establishment of a drainage ditch is the filing of a petition. (§2, ch. 134, Laws of 1907; §8459, R. S. 1919). This petition must "set forth "the necessity for the drainage, a description of the pro-"posed route by its initial and terminal points and its "general course, or by its exact course in whole or in part, "and a *general statement of the territory likely to be "affected thereby"*. It will be noticed that in the petition, which is the initial and jurisdictional step in the formation of a drainage ditch, it is not necessary to include a description of the property which will be affected and upon which assessments will be levied to pay the costs of the construction of the ditch. All that is required is a "general statement of the territory likely to be affected "thereby." The next step in the proceeding is for the County Auditor to transmit a copy of the petition to the State Engineer, who, together with the Board of County Commissioners is required to inspect the proposed route and "if in the opinion of the Board and the State Engi-"neer it is necessary," the Board of County Commissioners causes a survey of the proposed drainage to be made by a competent engineer, selected by the Board, but under the general supervision of the State Engineer. This survey is primarily for the purpose of aiding the Board in determining the necessity for the proposed drainage but

it may be a complete survey such as will be required for the construction of the drainage and the assessment of its cost. All this is within the jurisdiction of the Board of County Commissioners. The survey may extend to other lands than those affected by the proposed drainage for the purpose of determining the best practical method of draining the entire section of country of which the lands proposed to be drained, or a portion of them, are a part. (§ 3, ch. 134, Laws of 1907; § 1, ch. 102, Laws of 1909; §8460, R. S., 1919). While the survey may, at the option of the Board of County Commissioners, be a complete survey for the purpose of ascertaining all facts required for the construction of the proposed drainage and the assessment of its cost, such complete survey is not rendered obligatory by the statute and the Board of County Commissioners may have made only so much of the survey as may be necessary to determine the necessity for the proposed drainage.

After receiving the report of the surveyor, the Board of County Commissioners is required to determine the "exact line and width of the ditch, if the same shall not "be fixed in the petition, and shall file its determination "with the petition." The Board then fixes the time and place for the hearing of the petition and gives notice by publication in a newspaper for two weeks and by posting copies of the notice in three public places near the route of the proposed drainage. The notice "shall describe the "route of the proposed drainage and the tract of country "likely to be affected thereby in general terms, the sep-"arate tracts of land through which the proposed drain-"age will pass and give the names of the owners thereof "as appears from the records of the office of the Register "of Deeds on the date of the filing of the petition, and "shall refer to the files in the proceeding for further par-"ticulars." The notice shall also "summon *all persons* "*affected* by the proposed drainage to appear at such "hearing and show cause why the proposed drainage shall "not be established and constructed." (§ 4, ch. 134, Laws of 1907; § 2, ch. 102, Laws of 1909; § 8461, R. S. 1919). This notice is the only notice given to property owners prior to the establishment of a drainage ditch and is the only notice under which the Board can acquire jurisdic-

tion to make an assessment. The owners are named of the separate tracts of land through which the proposed drainage will pass but no description is given of the property *affected by the proposed drainage ditch or which will be assessed for the cost of the construction thereof.* The notice merely describes the route of the proposed drainage and the "tract of country likely to be affected thereby *"in general terms"* and then summons *"all persons af-"fected by the proposed drainage"* to appear at the hearing. A notice designating as the tract of country "likely "to be affected thereby in general terms" would be sufficient, if it named as such "tract of country" the entire county in which the drainage ditch is to be constructed. Nothing whatever is required in the notice by which any property owner, other than one owning land through which the ditch is to be constructed, is appraised that he is affected or that his land will be assessed for the construction of the proposed drainage ditch. In fact, all that the South Dakota law requires is for the Board of County Commissioners of a South Dakota county to publish and post a general notice summoning "all persons affected" to appear at the hearing, in order to support an assessment, for the construction of the ditch, upon all of the real property situated within the county limits. There is absolutely nothing in the statutory notice to inform any property owner that he will be called upon to pay an assessment. After the ditch is constructed, the Board of County Commissioners is at liberty, under the South Dakota statute, to extend the assessment to all property in every direction up to the county boundary lines. If this be sufficient notice, then after it is given, the Board of County Commissioners has the power to assess for the cost of the construction of any ditch every acre of property within the county limits.

At the hearing upon the petition, the South Dakota statute kindly permits "any person interested" to appear and contest the statements of the petition and matters set forth in the surveyor's report and the finding of the Board as to the width and route of the proposed ditch. After the hearing, the County Board may establish the drainage ditch. (§ 5, ch. 134, Laws of 1907; § 3, ch. 102, Laws of 1909; § 8462, R. S. 1919).

After the establishment of the drainage ditch, the Board of County Commissioners "shall fix the proportion of benefits of the proposed drainage among the lands affected and shall appoint a time and place for equalizing the same." (§6, ch. 134, Laws of 1907; § 4, ch. 102, Laws of 1909; § 8463, R. S. 1919). There is no statutory requirement as to how soon after the establishment of the drainage ditch this shall be done and it is not necessary that it be done before the drainage project has been completed. It must be done before an assessment is made for the purpose of paying the cost of the establishment of the drainage project but the assessment, when made, includes all costs already incurred, or thereafter to be incurred. (§ 7, ch. 134, Laws of 1907; § 5, ch. 102, Laws of 1909; ch. 130, Laws of 1911; § 8464, R. S. 1919.)

The notice of equalization of proportion of benefits is given by publication once in each week for two consecutive weeks in a newspaper of the county and by posting copies of the notice in three public places near the route of the proposed drainage. The law requires that the "notice "shall state the route and the width of the drainage estab- "lished, a description of each tract of land affected by "the proposed drainage and the names of the owners of "the several tracts of land as appears from the records "of the office of the Register of Deeds, at the date of filing "of the petition, and the proportion of benefits fixed by "each tract of property, taking any particular tract as a "unit, and shall notify all such owners to show cause why "the proportion of benefits shall not be fixed as stated." (§ 6, ch. 134, Laws of 1907; § 4, ch. 102, Laws of 1909; § 8463, R. S. 1919). Here for the first time there is published a description of each tract of land "affected" by the proposed drainage and the names of the owners of such tracts. As in the case at bar, the work may have been completed and an expense of over a quarter of a million dollars incurred before the Board of County Commissioners determines what particular lands are "affected" by the proposed drainage and gives notice to the owners of such lands. A property owner for the first time notified that his land is "affected" by the proposed drainage has no right to object in any manner to the establishment of the drainage project. He has nothing to say in re-

gard to its manner or cost of construction; he has no voice in the selection of the particular tract of land taken as a unit; and all concerning which he can be heard is as to whether the proportion of benefits "shall not be fixed "as stated."

It is now too late for the property owner to escape. He is like a rat in a trap. All that he can do is to appear before the Board of County Commissioners and object to the proportion of benefits which has been assessed against him and ask to have that proportion reduced by raising the proportion of some other property owner. He is precluded from raising any question whatsoever as to the right to include his property within the drainage area. He has nothing to say as to the necessity for the drainage project or as to its manner of construction or its cost. Without any notice, either personal or constructive, his property has been included in the drainage area under the general proclamation of the Board of County Commissioners and he has no redress.

Theirs not to make reply,
Theirs not to reason why,
Theirs but to do and die,

even though

Someone had blundered.

The property owner cannot question the validity of the proceedings. All that is left for him to do is to pay.

Our contention is that the South Dakota drainage statute is in violation of the due process of law clause of the fourteenth amendment to the federal constitution for the reason that no opportunity is given a property owner, whose property is "affected" by the proposed drainage project, to appear prior to the doing of the work and the making of the assessment for the construction cost.

In support of the constitutionality of the South Dakota drainage statute, counsel for appellants have cited *Spencer vs. Merchant*, 125 U. S. 345. That case was decided by a divided court. The legislature of the state of New York had, by express enactment, determined that certain lands should be included within an assessment district in which the cost of the improvement was to be proportioned. The majority of the court held "that the deter-"mination of the territorial district which should be taxed

"for local improvement is within the province of legisla-
"tive discretion." The courts in this and a line of suc
ceeding cases have made a clear distinction between cases in which a taxing district has been established by an act of the legislature and cases in which special assessments are to be made by some taxing body upon the property "beneficially affected" but not included within any taxing district established by legislative enactment. In the cases of taxing districts established by act of the legislature no notice need be given to the property owners of the inclusion of their property within the district, but a different rule applies in cases in which the taxing district is determined by the area of the land "beneficially affected."

Fallbrook Irrigation District vs Bradley, 164 U. S. 112, also cited by counsel in support of the constitutionality of the South Dakota drainage law, is, when carefully read, a strong authority against the constitutionality of the South Dakota statute. In the very elaborate opinion in this case the Court (p. 167) says:

"The legislature not having itself described the dis-
"trict, has not decided that any particular land would or
"could possibly be benefited as described, and, therefore,
"it would be necessary to give a hearing at some time to
"those interested upon the question of fact whether or
"not the land of any owner which was intended to be in-
"cluded would be benefited by the irrigation proposed. If
"such a hearing were provided for by the act, the de-
"cision of the tribunal thereby created would be sufficient.
"Whether it is provided for will be discussed when we
"come to the question of the proper construction of the
"act itself."

Later on in the opinion the court discusses the question whether the statute does provide for a hearing prior to the formation of the district and holds that under the provision of the statute under consideration and under the construction given it by the supreme court of California, by which state it was enacted, the right of hearing is given the property owner prior to the formation of the district. The court discusses the statute (pp. 170-172):

"We come now to the question of the true construc-
"tion of the act. Does it provide for a hearing as to
"whether the petitioners are of the class mentioned and

"described in the act and as to their compliance with the "conditions of the act in regard to the proceedings prior "to the presentation of the petition for the formation of "the district? Is there any opportunity provided for a "hearing upon notice to the land owners interested in the "question whether their lands will be benefited by the "proposed irrigation? We think the right to a hearing "in regard to all these facts is given by the act and that it "has been practically so construed by the Supreme Court "of California in some of the cases, above cited from the "reports of that court and in the case cited in the briefs "of counsel. We should come to the same conclusion from "a perusal of the act. The first two sections provide for "the petition and a hearing. The petition is to be signed "by a majority of the holders of title to lands susceptible "of one mode of irrigation, etc. This petition is to be pre-"sented to the board of supervisors at a regular meeting, "and notice of intended presentation must be published "two weeks before the time at which it is to be presented. "The board shall hear the same, shall establish and de-"fine the boundaries, although it cannot modify those de-"scribed in the petition, so as to except from the district "lands susceptible of irrigation by the same system of "works applicable to the other lands in the proposed dis-"trict, and the board cannot include in the district, even "though included in the description in the petition, lands "which shall not, in the judgment of the board, be bene-"fited by irrigation by said system.

"If the board is to hear the petition upon notice, and "is not to include land which will not, in its judgment, be "benefited by irrigation by the system, we think it fol-"lows as a necessary and a fair implication that the per-"sons interested in or who may be affected by the pro-"posed improvement have the right under the notice to "appear before the board and contest the facts upon which "the petition is based, and also the fact of benefit to any "particular land included in the description of that pro-"posed district.

"It is not an accurate construction of the statute to "say that no opportunity is afforded the landowner to test "the sufficiency of the petition in regard to the signers "thereof and in regard to the other conditions named in

"the act; nor is it correct to say that the power of the "board of supervisors is, in terms, limited to making such "changes in the boundaries proposed by the petitioners "as it may deem proper, subject to the conditions named "in the act.

"When the act speaks of a hearing of the petition, "what is meant by it? Certainly it must extend to a "hearing of the facts stated in the petition, and whether "those who sign it are sufficient in number and are among "the class of persons mentioned in the act as alone having "the right to sign the same. The obvious purpose of the "publication of the notice of the intended presentation of "the petition is to give those who are in any way interest-"ed in the proceeding an opportunity to appear before "the board and be heard upon all the questions of fact, "including the question of benefits to lands described in "the petition. As there is to be a hearing before the "board, and the board is not to include any lands which "in its judgment will not be benefited, the plain construc-"tion of the act is that the hearing before the board in-"cludes the question as to the benefits of the lands, be-"cause that is one of the conditions upon which the final "determination of the board is based, and the act cannot "in reason be so construed as to provide that while the "board is to give a hearing on the petition it must never-"theless decide in favor of the petitioners, and must estab-"lish and define the boundaries of the district, although "the signers may not be fifty, or a majority of the hold-"ers of title, as provided by the act, and notwithstanding "some other defect may become apparent upon the hear-"ing."

It will be seen in *Fallbrook Irrigation District vs Bradley* that the California statute differs from the South Dakota statute in that the petition must "particularly de-"scribe the proposed boundaries of such districts" and the petition itself must be published. After the petition is published and has been passed upon by the Board of Supervisors the question of the formation of the irriga-tion district is submitted to an election of the electors of the district who are also freeholders. (*Fallbrook Irriga-tion District vs Bradley*, 164 U. S. 112, pp. 116-117). These facts differentiate the statute passed upon in *Fall-*

brook Irrigation District vs Bradley from the South Dakota statute under consideration. Under the California statute the boundaries of the proposed district are fixed in the first instance and after they have been determined then the question of the formation of the district is put to a vote of the freeholder electors. We submit therefore, that the decision in *Fallbrook Irrigation District vs Bradley* is a distinct authority in favor of our position that the South Dakota drainage statute is unconstitutional. The court expressly determines in that case that notice must be given to the property owner of the formation of the district before his property can be included in it, and one of the requisites of notice is that the property owner be advised in some manner, either actually or constructively, that his land will be included within the limits of the proposed project.

Embree vs Kansas City Road District, 240 U. S. 242, is another case relied upon by counsel in support of the constitutionality of the South Dakota law. Here, again, is a case which we submit directly sustains our contention as to the invalidity of the South Dakota statute. The Court in the opinion (pp. 246-248) says:

"The district was not established or defined by the "legislature, but by an order of the county court made "under a general law. Whether there was need for the "district and, if so, what lands should be included and "what excluded was committed to the judgment and dis-"cretion of that court subject to these qualifications: "First, that the district should contain at least 640 acres "of contiguous land and be wholly within the county; sec-"ond, that the court's action should be invoked by a peti-"tion signed by the owners of a majority of the acres in "the proposed district, and, third, that public notice—con-"ceded to be adequate—should be given, by the clerk of "the court, of the presentation of the petition and the "date when it would be considered, and that owners of "land within the proposed district should be accorded an "opportunity to appear, either collectively or separately, "and oppose its formation. In this connection the statute "says: 'The court shall hear such petition and remon-" 'strance, and shall make such change in the boundaries " 'of such proposed district as the public good may re-

"'quire and make necessary, and if after such changes "'are made it shall appear to the court that such petition "'is signed or in writing consented to by the owners of "'a majority of all the acres of land within the district "'as so changed, the court shall make a preliminary order "'establishing such public road district, and such order "'shall set out the boundaries of such district as estab- "'lished . . . but the boundaries of no district shall be "'so changed as to embrace any land not included in the "'notice made by the clerk unless the owner thereof shall "'in writing consent thereto, or shall appear at the hear- "'ing and is notified in open court of such fact and given "'an opportunity to file or join in a remonstrance.' The "order actually made shows that four of the present plain- "tiffs, with three others, appeared in opposition to the "petition, recites that 'the court, after hearing and con- "'sidering said petition and said protests and remon "'strances and all evidence offered in support thereof, "'finds that the public good requires and makes necessary "'the organization, formation and creation of such pro- "'posed public road district . . . with boundaries as stated "'in said petition,' and sets out the boundaries of the "district as established.

"The sole purpose in creating the district, as the "statute shows, was to accomplish the improvement of "public roads therein—the particular roads to be desig- "nated by the district commissioners and an approving "vote of the land owners.

"As the district was not established by the legisla- "ture but by an exercise of delegated authority, there was "no legislative decision that its location, boundaries and "needs were such that the lands therein would be benefit "ed by its creation and what it was intended to accom- "plish, and, this being so, it was essential to due process "of law that the land owners be accorded an opportunity "to be heard upon the question whether their lands would "be thus benefited. If the statute provided for such a "hearing, the decision of the designated tribunal would be "sufficient, unless made fraudulently or in bad faith. "*Fallbrook Irrigation District vs Bradley,* 164 U. S. 112, "174-175.

"Did the statute contemplate such a hearing? We

"have seen that it required that adequate public notice "be given of the presentation of the petition for the crea- "tion of the district and the time when it would be con- "sidered, made provision for the presentation of remon- "strances by owners of lands within the proposed district, "and directed that the petition and remonstrances be "heard by the county court, that the court make such "change in the boundaries 'as the public good may re- "'quire' and that the boundaries be not enlarged unless "the owners of the lands not before included consent in "writing or appear at the hearing and be given an oppor- "tunity to present objections. That a hearing of some "kind was contemplated is obvious, and conceded."

The case of *Soliah vs Heskin*, 222 U. S. 522, is strongly relied upon by counsel. That is a case arising under the North Dakota drainage law. The opinion at first glance would seem to support the contention of counsel for Appellants but an examination of the North Dakota statute, upon which the case arose, discloses the fact that the North Dakota law was not subject to the same objections which are urged against the South Dakota enactment. Under the North Dakota statute, a petition for the construction of the drain is filed with the board of drain commissioners. This petition designates the starting point and terminus and general course of the proposed drain. The board of drain commissioners then employs surveyors who prepare profiles, plans, and specifications of the proposed drain, an estimate of the cost thereof, and a map or plat of the lands to be drained in duplicate, showing the regular subdivisions thereof, one copy of which is filed in the office of the county auditor in the county in which the drain is proposed to be constructed and the other with the board of drain commissioners, subject to inspection. Upon the filing of the surveyor's report, the board of drain commissioners fixes a date and public place for hearing objections to the petitions and gives notice of such hearing. The notices must contain a copy of the petition and a statement of the date of filing of the surveyor's report and the date when the board will act upon the petition, must be signed by a majority of the members of the drainage board and "shall be sent by "registered mail to the last known address of each and

"every *owner of land which may be affected* by the pro-"posed drain." The North Dakota statute therefore requires that the names of "each and every owner of land "which may be affected" be determined and actual notice given these at the very inception of the project and this notice must be given by sending to each owner a copy of the petition and of a statement of the date of filing the surveyor's report and the date upon which the board will act upon the petition. That is a very different proposition from merely publishing notice "to all persons whose "property is affected" without first determining who are affected, as required by the South Dakota statute. The opinion in the case of *Soliah vs Heskin* must consequently be read in the light of the North Dakota statute which provides for the giving of notice at two stages of the proceedings to the property owner, first, a notice before the drainage district is formed, and, second, a notice when the assessment of benefits is made. The North Dakota statute provides exactly the thing for the want of which the South Dakota statute is unconstitutional.

Counsel for Appellants place great reliance upon the recent case of *Milheim vs Moffat Tunnel District*, 262 U. S. 710. That case is clearly to be distinguished from the case at bar. It is a case arising upon an assessment made in a taxing district, the limits of which had been fixed by act of the legislature of the state of Colorado. The supreme court held, following *Spencer vs Merchant*, 125 U. S. 345, and other similar cases, that the legislative authority of a state extends to the formation of taxing districts and that a state legislature can enact a law fixing the boundaries of a taxing district without giving notice to the owners of property included therein. That is an entirely different proposition from the one arising under the South Dakota drainage law and the decision of the supreme court in *Milheim vs. Moffat Tunnel District* is not an authority in support of the South Dakota statute which on its face does not attempt to form a taxing district by legislative enactment.

The case of *Voight vs Detroit City*, 184 U. S. 115, was cited by JUDGE ELLIOTT in his opinion deciding this case in the District Court. This case is one of a line of cases involving the making of special assessments in cities

for various municipal purposes. See also *St. Louis Land Company vs Kansas City,* 241 U. S. 419. In this line of cases the courts hold that cities organized under general laws or special acts of the legislature may impose special assessments under general statutes authorizing the levying of assessments in proportion to benefits. In all such cases, it is held by the courts, some opportunity must be given the taxpayer to be heard as to the proportion of the benefits to be assessed against his property but the property owner is not entitled to a hearing upon the question of the determination whether the improvements shall be made for which the special assessment is levied.

In the case of *Central of Georgia Railway Company vs Wright,* 207 U. S. 127, the Supreme Court held (quoting from the syllabus): "Due process of law requires "that opportunity to be heard as to the validity of the tax "and the amount of the assessment be given to a taxpay- "er, who, without fraudulent intent and in the honest be- "lief that it is not taxable, withholds property from tax "returns, and this requirement is not satisfied where the "taxpayer is allowed to attack the assessment only for "fraud and corruption."

In *Londoner vs Denver,* 210 U. S. 373, the Court, passing upon a Colorado statute, says:

"In the assessment, apportionment and collection of "taxes upon property within their jurisdiction the Con- "stitution of the United States imposes few restrictions "upon the States. In the enforcement of such restric- "tion as the Constitution does impose this court has re- "garded substance and not form. But where the legis- "lature of a State, instead of fixing the tax itself, com- "mits to some subordinate body the duty of determin- "ing whether, in what amount, and upon whom it shall "be levied, and of making its assessment and apportion- "ment, due process of law requires that at some stage "of the proceedings before the tax becomes irrevocably "fixed, the taxpayer shall have an opportunity to be "heard, of which he must have notice, either personal, by "publication, or by a law fixing the time and place of the "hearing. *Hager vs Reclamation District,* 111 U. S. 701; "*Kentucky Railroad Tax Cases,* 115 U. S. 321; *Winona &* "*St. Peter Land Co. vs Minnesota,* 159 U. S. 526, 537;

"*Lent vs Tillson,* 140 U. S. 316; *Glidden vs Harrington,*
"189 U. S. 255; *Hibben vs Smith,* 191 U. S. 310; *Security*
"*Trust Co. vs. Lexington,* 203 U. S. 323; *Central of*
"*Georgia vs Wright,* 207 U. S. 127. It must be remem-
"bered that the law of Colorado denies the landowner
"the right to object in the courts to the assessment, upon
"the ground that the objections are cognizable only by
"the boards of equalization.

"If it is enough that, under such circumstances, an op-
"portunity is given to submit in writing all objections to
"and complaints of the tax to the board, then there was a
"hearing afforded in the case at bar. But we think that
"something more than that, even in proceedings for tax-
"ation, is required by due process of law. Many require-
"ments essential in strictly judicial proceedings may be
"dispensed with in proceedings of this nature. But even
"here a hearing in its very essence demands that he who
"is entitled to it shall have the right to support his alle-
"gations by argument however brief, and, if need be, by
"proof, however informal. *Pittsburg &c Railway Co. vs*
"*Backus,* 154 U. S. 421, 426; *Fallbrook Irrigation District*
"*vs Bradley,* 164 U. S. 112, 171, *et seq.* It is apparent
"that such a hearing was denied to the plaintiffs in error.
"The denial was by the city council, which, while acting
"as a board of equalization, represents the state. *Ray-*
"*mond vs Chicago Traction Co.,* 207 U. S. 20. The as-
"sessment was therefore void, and the plaintiffs in error
"were entitled to a decree discharging their lands from
"a lien on account of it."

In *Turner vs Wade,* 254 U. S. 64, the Court held (quoting from the syllabus) as follows:

"The Georgia Tax Equalization Act (Laws, 1913, p.
"123 §§ 6-7), empowers the Board of County Tax Assess-
"ors to assess property for taxation and requires it to
"notify the taxpayer of changes made in his returns; it
"gives him, if dissatisfied, the right to demand an arbitra-
"tion, and provides that a majority of three arbitrators,
"one appointed by him, one by the Board and the third by
"the two so selected, shall fix the assessment; but the
"arbitrators must render their decision within ten days
"from the naming of the arbitrator by the board, other-
"wise the Board's decision—i. e., its assessment—stands

"affirmed; and no notice is afforded the taxpayer before "the making of the Board's assessment, nor any oppor- "tunity to be heard concerning it save that before the "arbitrators. Held, that an assessment so made by the "Board of County Tax Assessors, increasing the valua- "tion returned by a property owner, without notice or "hearing, was without due process of law, where his rem- "edy by arbitration proved abortive because the arbitra- "tors, though agreeing that the assessment was excessive, "could no two of them unite on a new assessment before "the ten day limitation expired."

We contend that an examination of the decisions of this Court pertinent to this case discloses that the following principles of law have been laid down:

First: That "due process of law" requires that at some stage of the proceedings the taxpayer must have an opportunity to appear and be heard *both as to the validity of the tax and as to its amount.*

Second: That the state legislature possesses the authority, by direct legislative enactment, to establish taxing districts and to fix the boundaries thereof without notice to the property owners included within such district.

Third: That where, by direct legislative enactment, certain territory has been formed into a taxing district the taxing authorities of such district may impose special assessments upon the property situated within the taxing district, pursuant to powers conferred by the legislature upon the taxing authorities, without first giving the property owner an opportunity to be heard as to the necessity for the making of the improvement, but in such cases the taxpayer must be given an opportunity to be heard as to the amount of the tax which he is to be compelled to pay.

Fourth: That in cases in which a taxing area or district is not formed by direct act of the legislature but is formed for the making of some public improvement by special assessments upon the property contained in the area or district, by local officers through authority delegated to them by the legislature to act upon petition of property owners, it is *absolutely essential to the validity of the proceedings that notice be given to the property owners whose interests are affected before the taxing area or dis-*

trict can be formed, the work done, and a tax imposed. The notice is not necessarily a personal one and may be by publication *but a notice of some character is essential.*

Analyzing all of the cases upon the subject, there cannot be found a single case in which a law containing the provisions of the South Dakota drainage law has been sustained by the courts. In every instance in which a law has been held valid there was a positive requirement that notice should be given to the taxpayer of a hearing upon the question of the making of the proposed improvements. In every instance the property affected has been definitely determined before the hearing and the property owner has been advised in some manner that his property is included within the area upon which it is intended that a tax or asssesment be imposed.

Search the law reports through; there cannot be found a case in which a mere general notice directed to "all persons affected" has been held to be a sufficient notice to a property owner that his property is to be included within an assessment area.

The inequity of a law like that of South Dakota is well illustrated by the results of the proceedings of the Board of County Commissioners of Minnehaha county in the case at bar. Under a notice to "all persons affected" it is sought to assess for the construction of the works in Drainage Ditch No. 1 and 2 not only the area formerly assessed for the construction of Drainage Ditch No. 1 and for the construction of Drainage Ditch No. 2, but to assess also property situated several miles from any of the work done in Drainage Ditch No. 1 and 2 and miles away from any of the land in the area assessed for the original construction of Drainage Ditch No. 1 or of Drainage Ditch No. 2. Property, that could not by any possibility be drained by the work done in Drainage Ditch No. 1 and 2 and that could not even remotely be benefited by that work, was included in the assessment area, and under the notice there could have been included just as well any other property situate within the limits of the 800 square miles comprising Minnehaha county.

If the County Commissioners of Minnehaha county had been required by the South Dakota drainage law to obtain, in the first instance, a survey and plat of the pro-

posed drainage area, and then to notify, either personally or by mail, publication, or posting, the property owners interested in that area, their proceedings might have had a semblance of legality, but under the South Dakota statute no such procedure is required. The County Commissioners have before them the names of the property owners through whose lands the drainage ditch passes but neither the Board of County Commissioners nor any one else has the slightest idea of what lands will be assessed for the cost of the construction of the drainage ditch. The only notice that is given to anyone is the general notice to "all persons affected." After the drainage works are completed, then for the first time a survey is made for the purpose of ascertaining what lands are "affected" and shall be assessed. The County Commissioners fix the proportion of benefits and publish the notice which, for the first time, informs the property owner that his land is liable for the assessment. It is then too late to lock the barn door. The horse has already been stolen. The drainage project has been constructed, the cost incurred, and all that is left for the property owner to do is to pay his assessment and "look pleasant." We reiterate, that never has a law of this character been sustained by this Court. All decisions of this Court, cited in support of the constitutionality of the South Dakota statute, can be easily distinguished as they are all of them based upon facts and principles of law which are not found in this case.

The bill in this case attacked directly the constitutionality of the South Dakota Drainage Statute. In the District Court the District judge upheld the constitutionality of the statute but granted an injunction upon other grounds (*Chicago, Rock Island & Pacific Railway Co. vs Risty,* 282 Fed. 364). In the Circuit Court of Appeals JUDGE KENYON, in delivering the opinion of the Court, expressly avoided passing upon the constitutional questions involved and while he expressly admitted that these questions were very grave ones, he held that their determination was not necessary to the decision of the case in that court and affirmed on other grounds the decision of the District Court.

Upon this appeal in this court, the constitutionality of the South Dakota Drainage Statute is again brought

before the court by the averments of the bill and answers and by the evidence introduced upon the trial in the District Court and preserved in the record in this Court. The position taken by the Plaintiff and Appellant is, that the South Dakota Drainage Law is in violation of the provisions of the Fourteenth Amendment to the Constitution and while, as will be discussed in a later portion of our argument, we contend that the proceedings taken by the Board of County Commissioners of Minnehaha County were so irregular as to render them invalid even if the statute were constitutional, we now submit, that on account of the unconstitutional provisions of the South Dakota Drainage Law the Board of County Commissioners of Minnehaha County possessed no authority to make assessments against the property of Appellee for the purpose of defraying the costs of the construction of Drainage Ditch No. 1 and 2.

In concluding our discussion upon this branch of this case we submit that the South Dakota drainage statute is unconstitutional in that no notice to property owners is required before a drainage assessment area is established or the work constructed and consequently the statute is unconstitutional as authorizing the taking of property without due process of law, contrary to the fourteenth amendment to the federal constitution.

II.

THE SOUTH DAKOTA DRAINAGE LAW IS IN VIOLATION OF SECTIONS 2 AND 13 OF ARTICLE VI OF THE SOUTH DAKOTA STATE CONSTITUTION AND IS THEREFORE UNCONSTITUTIONAL.

We now come to the question of the constitutionality of the South Dakota drainage law under the provisions of the South Dakota State Constitution. Section 2 of Article VI of the South Dakota Constitution provides as follows:

"§ 2. No person shall be deprived of life, liberty or "property without due process of law."

Section 13 of Article VI of the South Dakota Constitution provides as follows:

"§ 13. Private property shall not be taken for public "use, or damaged without compensation * * * * *"

It will thus be seen that the South Dakota state constitution contains not only the due process of law clause contained in the fourteenth amendment to the federal constitution but also the just compensation clause contained in the fifth amendment to the federal constitution, thus making the provisions applicable to the state which by the fifth amendment are made applicable to the federal government.

The South Dakota drainage statute has a number of times been before the South Dakota supreme court for construction in various of its phases but the question as to the constitutionality of the statute, by reason of its failure to provide a notice to property owners before the assessment area is determined, has never been presented to the South Dakota supreme court or passed upon by that court. Shortly prior to the institution of the case at bar, a suit was commenced in the circuit court of Minnehaha county, South Dakota, by one Oluf O. Gilseth against the Board of County Commissioners of Minnehaha county and other persons, to restrain certain acts with relation to the making of an apportionment of benefits for the construction of the drainage works in controversy in the case at bar. Gilseth, the plaintiff in that case, was a property owner residing upon the flats north of the city of Sioux Falls upon whose land the County Commissioners were attempting to make an assessment. The South Dakota supreme court held that Gilseth was estopped by his actions with respect to the construction of the drainage works from objecting to an assessment to pay for their cost of construction, and the decision appears as *Gilseth vs Risty*, 46 S. D. 374. In the opinion of the majority of the Court, the Court says: "We do not understand that "appellant questions the constitutionality of the law un- "der which the said project was carried out." The Court thereupon proceeds to determine the case under the assumption that the law is constitutional and that the plaintiff, Gilseth, makes no attack upon it. In the dissenting opinion filed by one of the Judges of the Supreme Court of South Dakota in *Gilseth vs Risty*, the question of the constitutionality of the statute is discussed but the opinion

of the majority of the Court decides the case under the express reservation that the question of constitutionality is not involved.

The Supreme Court of South Dakota, in the case of *Evans vs Fall River County*, 9 S. D. 130, stated the law in that jurisdiction in the following language:

"Notice to the taxpayer is a jurisdictional matter, "and his right to be heard in opposition to an assessment, "or to the amount thereof, is vitally essential to the valid- "ity of every assessment. *Black, Tax Titles*, 488; 2 "*Blackw. Tax Titles*, 953; *Cooley, Tax'n*, 227; *County of* "*Santa Clara vs Southern Pac. R. Co.*, 18 Fed. 385; *Pow-* "*ers vs. Larrabee (N. D.)*, 49 N. W. 724; *Bank vs. Maher*, "9 Fed. 884."

From the foregoing citation it will be seen that the Supreme Court of South Dakota recognizes the doctrine laid down by the Supreme Court of the United States to the effect that in a special assessment proceeding the taxpayer must have the right, at some time or other, and in some manner or other, to be heard both as to the validity and as to the amount of the assessment.

The same argument which we have made relating to the unconstitutionality of the South Dakota drainage statute under the fourteenth amendment to the federal constitution applies with equal force to the statute considered in the light of the provisions of the South Dakota constitution.

We therefore contend that the South Dakota drainage law is unconstitutional under the constitution of that State for the reason that no notice is given the property owner of the proceedings precedent to the determination of the boundaries of the assessment area.

Counsel for Appellants argue that the proceedings had in the case at bar are valid for the reason that, as a matter of fact, the drainage notice did contain a description of the property sufficient to give notice to each property owner whose lands were affected. We do not by any means concede that the notice given was sufficient to apprise property owners that their lands were to be subject to assessment for the payment of the cost of the construction of the drainage project, but even if the Board of County Commissioners of Minnehaha county had pub-

lished a notice sufficient for that purpose it would not have helped the situation. The statute does not require any such notice to be published and is consequently unconstitutional. Validity cannot be injected into an unconstitutional and void statute by taking under it the proceedings which would have to be taken under a constitutional and valid status. The law being unconstitutional, all proceedings under it are invalid *ab initio*.

III.

THE LEGISLATURE OF SOUTH DAKOTA HAS NEVER EXERCISED THE AUTHORITY GRANTED TO IT BY SECTION 6 OF ARTICLE XXI OF THE SOUTH DAKOTA CONSTITUTION PROVIDING FOR THE ORGANIZATION OF DRAINAGE DISTRICTS.

To the proper determination of this case, there is necessary a consideration of just what of the powers granted to it by the South Dakota constitution the legislature of that state has attempted to exercise by the enactment of the South Dakota drainage statute. This involves an analysis of the exact phraseology of the constitutional provision under which the legislature obtained its power to act. Section 6 of Article XXI of the constitution constitutes that authority and is as follows:

"§ 6. The drainage of agricultural lands is hereby "declared to be a public purpose and the legislature may "provide therefor, and may provide for the organization "of drainage districts for the drainage of lands for any "public use, and may vest the corporate authorities there-"of, and the corporate authorities of counties, townships "and municipalities, with power to construct levees, drains "and ditches, and to keep in repair all drains, ditches and "levees heretofore constructed under the laws of this "state, by special assessments upon the property bene-"fited thereby, according to benefits received."

The first clause of the foregoing section declares that the drainage of agricultural lands is a public purpose, and gives the legislature power to "provide therefor." This clause is complete in itself and to determine its meaning and intent requires no aid from the remainder of the section.

The section then goes further and gives the legislature authority to "provide for the organization of drain-"age districts for the drainage of lands for any public "use." This is a power conferred upon the legislature distinct and in addition to that contained in the first clause of the section. It gives the legislature authority to establish drainage districts for the purpose, not only of carrying into effect the power to drain agricultural lands, but for the purpose of carrying on any drainage project for "any public use."

As the section stands, when the first and second clauses are considered together, it appears that three things are provided for: (a) the drainage of agricultural lands is made a public purpose, (b) the legislature is given power to provide for the drainage of agricultural lands, and (c) the legislature is given power to provide for the organization of drainage districts for the drainage of land for any public use.

The constitutional section then continues giving to the legislature authority, (a) to vest the corporate authorities of drainage districts with power to construct levees, drains and ditches and keep in repair all drains, ditches and levees theretofore constructed under the laws of the state, by special assessments upon property benefited thereby, according to benefits received, and (b) to vest the corporate authorities of counties, townships, and municipalities with power to construct levees, drains and ditches and keep in repair all drains, ditches, and levees theretofore constructed under the laws of the state, by special assessments upon the property benefited thereby, according to the benefits received.

Throughout the entire section there appears a clear intent to authorize the legislature to proceed in matters respecting drainage of lands in either of two ways, (a) by the organization of drainage districts with corporate authorities, and (b) by empowering the corporate authorities of counties, townships and municipalities with power to enter upon and carry out drainage projects. It is not made obligatory upon the legislature to follow either system for the construction of drainage. The constitution gives the legislature the option to carry on drainage work by drainage districts organized as separate en-

tities, or to carry on the work through the regularly constituted authorities of counties, townships, and municipalities. The legislature of South Dakota, acting under the constitutional option given it by Section 6 of Article XXI of the constitution, has declined to provide for the organization of drainage districts as separate corporate entities, and has provided for the doing of all drainage work through the corporate authorities of the various counties, to-wit, the Board of County Commissioners, county auditor, county treasurer, and other county officers.

It follows that in the case at bar there was not and could not under the law have been formed any drainage districts. The drainage projects, known as Drainage Ditch No. 1, and Drainage Ditch No. 2, and Drainage Ditch No. 1 and 2, were all conceived and carried out by the county authorities of Minnehaha county under the constitutional provision giving the legislature the power to vest in the county authorities the power to construct levees, drains, ditches, etc. The legislature never attempted to exercise the power given it by the constitution to organize drainage districts, and the application of the term "district" to the assessment area of Drainage Ditch No. 1, Drainage Ditch No. 2, or Drainage Ditch No. 1 and 2 is a misnomer. That term is reserved by the South Dakota constitution for an entirely different sort of organization and should not be used in connection with a drainage project carried on by the Board of County Commissioners under the South Dakota statute.

The situation with respect to this matter was pointed out by Judge Elliott in his opinion upon the trial of this case in the District Court. *Chicago, Rock Island & Pacific Railway Company vs Risty*, 282 Fed. 364. In this opinion, Judge Elliott says, (p. 368): "Pursuant to this "provision of the constitution, the legislature of the state "has provided for the drainage of agricultural lands: "*but nowhere is there any statutory enactment under "which drainage districts may be formed for the drain-"age of lands 'for any public use.'*"

A further examination of the particular wording of Section 6 of Article XXI of the South Dakota constitution discloses the important bearing which the failure of

the legislature to exercise the authority of establishing drainage districts has upon the decision of the case at bar. The wording of the constitutional provision is that the legislature "may provide for the organization of drain-"age districts for the drainage of lands for any public use," and may vest "the corporate authorities thereof," etc. Eliminate the quoted words (which are the only ones in the section referring to drainage districts) from the section and the result would be that the section would read, "The drainage of agricultural lands is hereby de-"clared to be a public purpose and the legislature may "provide therefor, and may vest the corporate authori-"ties of counties, townships and municipalities with pow-"er to construct levees, drains, and ditches, etc."

In other words, the South Dakota legislature is given authority to carry on drainage projects either through the formation of drainage districts as corporate entities, or through the municipal authorities of the counties, townships, and municipalities, but while drainage "for "any public use" may be constructed through corporate drainage districts, drainage of lands for agricultural purposes only may also be carried on by the county, townships and other municipal authorities. The constitution nowhere gives the legislature power to provide that drainage for "any public use" other than the drainage of agricultural lands may be constructed by the county, township, or other municipal authorities. Drainage for any other public purpose must be constructed by districts specially organized therefor.

It consequently follows that the legislature of South Dakota cannot, under the provisions of the state constitution, authorize drainage projects, for other than agricultural lands, to be conducted by the county, township, or other municipal authorities. Such authorities may construct drainage projects for the drainage of agricultural lands, but for any other public purposes the works must be constructed by the corporate authorities of drainage districts established for that purpose.

While the legislature of South Dakota had the right, under the state constitution, to enact a law authorizing the Board of County Commissioners of Minnehaha county to construct a drainage project for the drainage of agri-

cultural lands, it could not, under the constitution, authorize the Board of County Commissioners to carry on any drainage project for any public use other than the drainage of agricultural lands.

It follows, therefore, that if Drainage Ditch No. 1 and 2 was initiated by the Board of County Commissioners of Minnehaha county for a purpose other than the drainage of agricultural lands, the Board exceeded their powers in constructing the dams, ditches, spillway, and other works in Drainage Ditch No. 1 and 2, for which Appellee is now asked to pay a proportionate part. The question whether Drainage Ditch No. 1 and 2 was a project for the drainage of agricultural lands or for some other purpose we will discuss in a separate section of this brief.

IV.

DRAINAGE DITCH NO. 1 AND 2 WAS NOT A PROJECT FOR THE DRAINAGE OF AGRICULTURAL LANDS, AND THE ACTION OF THE BOARD OF COUNTY COMMISSIONERS OF MINNEHAHA COUNTY IN ENTERING UPON THE PROJECT AND IN CARRYING IT ON WAS *ULTRA VIRES*.

We now come to the consideration of the question as to whether Drainage Ditch No. 1 and 2 was a project for the drainage of agricultural lands or for the carrying out of some other purpose. There are at this time before this court pending appeals in six cases involving Drainage Ditch No. 1 and 2, and there is a divergence of views of the Appellees in various of the six cases as to the status of the drainage proposition. In some of the cases, the Appellees contend that Drainage Ditch No. 1 and 2 was simply a continuation of Drainage Ditch No. 1 and of Drainage Ditch No. 2, and that the work was initiated and carried on by the Board of County Commissioners of Minnehaha county as a project for the repairing of Drainage Ditch No. 1 and of Drainage Ditch No. 2. In the case at bar, the position which we take is that Drainage Ditch No. 1 and 2 must be considered as an independent project entered upon by the Board of County Commissioners and that it is not a mere project for the re-

pair of Drainage Ditch No. 1 and of Drainage Ditch No. 2, and is not in any manner controlled by the original proceedings for the construction of the old ditches. We contend that Drainage Ditch No. 1 and 2 must be considered as if it were an entirely new proposition entered upon after the spillway at the outlet of Drainage Ditch No. 1 had been washed out in the spring of 1916.

In the bill in this suit, it is alleged that the Board of County Commissioners of Minnehaha county has spent a sum in excess of $255,000 in the construction of a spillway, dams, and retaining gates, "designed not for the "purpose of drainage of agricultural lands, but solely "for the purpose of controlling and retarding the flow "of water, through the outlet of said Drainage Ditches "No. 1 and No. 2 into the Big Sioux river for the pur-"pose of preventing a change in the channel of said river "and of preventing the drainage of the gravel bed through "which the said city of Sioux Falls obtains its water "supply." It is further alleged that less than five per cent of such money has been expended for any purpose legitimately connected with the construction and maintenance of Drainage Ditch No. 1 and of Drainage Ditch No. 2. The bill further sets up the alleged proceedings for the organization of Drainage Ditch No. 1 and 2.

The answer sets up the organization of Drainage Ditch No. 1 and 2 as a separate organization from Drainage Ditch No. 1 and Drainage Ditch No. 2, and the theory of Appellants is that Drainage Ditch No. 1 and 2 was a separate and independent organization and not a mere continuation of Drainage Ditch No. 1 and Drainage Ditch No. 2, and that its formation was compelled for the purpose of saving the water supply of the city of Sioux Falls, and preventing the change of the channel of the Big Sioux river, and the imperiling of the interests of various property owners.

The position of Appellants throughout this case has been that Drainage Ditch No. 1 and 2 was a new and separate organization. They have so pleaded, and with their allegations in this regard we have no contention to make. The Appellee in this case is satisfied to rest this proposition upon the allegations of the answer and to concede that Drainage Ditch No. 1 and 2 was a new or-

ganization and was entirely independent of the original ditches. As we have said, in others of the six cases tried at the same time and upon the same record as this case, the plaintiffs (Appellees in this court) contested the claim of the defendants and intervenors (Appellants in this court) that Drainage Ditch No. 1 and 2 was a new and independent proposition and contended that all of the work done by the Board of County Commissioners was done merely as a continuation of the work upon the original ditches, Drainage Ditch No. 1 and Drainage Ditch No. 2. JUDGE ELLIOTT, in his opinion filed in the District Court, arrived at the conclusion that Drainage Ditch No. 1 and 2 was not a new and independent organization but was simply a continuation of the old original ditches. *Chicago, Rock Island & Pacific Railway vs Risty*, 282 Fed. 364 (p. 374 *et seq*).

With due respect to the opinion of the learned District Judge (who evidently felt inclined to hold so as not to preclude the holders of the drainage ditch warrants from a right to recover the amount of their investments from the property owners within the original assessment area of the Drainage Ditch No. 1 and of Drainage Ditch No. 2), we respectfully submit, that under the allegations of the bill and answer in this case, and under the evidence contained in the record, Drainage Ditch No. 1 and 2 must be deemed to be a new and independent organization and must stand or fall as such. If it possesses no life of its own, life cannot be injected into it by treating it as a continuation of the old original ditch organizations.

It appears from the evidence in this case that after the outlet of Drainage Ditch No. 1 had been washed out in the spring of 1916, various plans were proposed for the controlling of the water so as to prevent the formation of a new river channel and the draining of the gravel bed, from which the city of Sioux Falls obtained its water supply. No changes in Drainage Ditch No. 1 and Drainage Ditch No. 2 were required for the purpose of draining agricultural lands in the flats north of the city of Sioux Falls. The two ditches were working beautifully, so far as that purpose was concerned. They formed a perfect, complete and satisfactory system for the drainage of the flats. The property owners in the

flats could not have asked for any drainage system more complete. The trouble was, that instead of draining too little, the ditches drained too much, and were too efficient in their operation. No change in them was required for any purpose connected with the drainage of agricultural lands. The only people interested were those who objected to the formation of a new channel for the Big Sioux river and who were interested in maintaining a water supply for the city of Sioux Falls. The change in the course of the river, if made, would have operated to destroy various industries dependent upon the water power at the dams south of the falls. It would also have prevented the flow of the water through the city limits, and would have forced the city of Sioux Falls to seek some other municipal water supply.

The Board of County Commissioners, after various plans had been considered and for one reason after another abandoned, finally formed a new organization under the name of Drainage Ditch No. 1 and 2, and went ahead and expended upwards of $250,000 in the construction of a spillway, retaining walls, retaining dams, ditches, etc. The greater part of the money was invested in a spillway, dam and retaining walls which were purposely intended to retard, rather than to accelerate the flow of the surface water which collected upon the flats north of the city of Sioux Falls, and which consequently were intended to hinder rather than to facilitate the drainage of the flats.

After $255,000 and over had been expended upon the spillway and other water retaining works, the Board of County Commissioners proceeded to make an apportionment of benefits upon the lands "affected" by the improvement. In the assessment area, the Board of County Commissioners included not only the territory which had been included in the assessment area of the original ditches, Drainage Ditch No. 1 and Drainage Ditch No. 2, but also included all of the lands and lots within a considerable distance on either side of the Big Sioux river between the south boundary of the property in the assessment areas of the original ditches, along the channel of the Big Sioux river for a distance of some nine miles, along where the river runs west and south of

the city of Sioux Falls and through the city, and up to a point a short distance north of Sioux Falls. The ostensible reason for the inclusion of all this additional territory was the alleged fact that the property along the river was subject to floods at the time of freshets which would be relieved by the construction of the spillway and other water retaining works. Upon the trial, it was shown that with the exception of a small tract of territory immediately south of the original ditch assessment areas, the remainder of the lands, for a space of eight or nine miles along the channel of the Big Sioux river, had never suffered from flood waters, excepting in the spring of 1881, and that the occasion for the flood in that year was not the collection of water upon the flats north of the city of Sioux Falls, but the forming of an ice gorge at a point in the river in the southeast portion of the city. There was consequently a total lack of any proof in the record that the territory, along the channel of the river and through the city of Sioux Falls attempted to be included in the assessemnt area, was in any manner affected, beneficially or otherwise, by the construction of the spillway and other water retaining works.

In addition, the Board of County Commissioners attempted to proportion "benefits" to the City of Sioux Falls, the Northern States Power Company (owners of the waterpower on the Big Sioux river above the falls), and upon four railroad companies (one of which was Appellee) having railroad tracks and station grounds situated within the attempted assessment area. In the case of Appellee, and of one of the other railroad companies sought to be assessed, the railroad owned right of way and trackage both in the assessment areas of the original ditches and in the additional territory attempted to be included within the assessment area of Drainage Ditch No. 1 and 2. The other two railroads owned trackage and property only in the new territory and had no mileage or station grounds in the original assessment areas. In the decrees entered in the various railroad cases, the District Court enjoined the assessment of the railroad properties not included in the original assessment areas but reserved, without prejudice, the deter-

mination of the question whether Appellee and the other railroad companies having land both in the original assessment areas and in the new assessment area should be held liable for an assessment upon its property in the original assessment area.

The question therefore arises whether, under the record in this case, the Board of County Commissioners of Minnehaha county possesses authority to make any apportionment of benefits whatsoever, or any assessment upon any property whatsoever, for the cost of the construction of the works in Drainage Ditch No. 1 and 2. Our contention in this regard is as follows:

It is alleged by the defendants and Appellants in their answer, and Appellee admits it to be a fact, that Drainage Ditch No. 1 and 2 was a new and independent proposition and not a continuation of Drainage Ditch No. 1 and of Drainage Ditch No. 2, and cannot be considered as a proposition for the repair of the original ditches. It is a project which must stand or fall upon its own footing.

Under the evidence in this case, Drainage Ditch No. 1 and 2 was not a project for the drainage of agricultural lands but was a project for another "public use," to-wit, the preservation of the water flowage in the channel of the Big Sioux river and of the supply of water in the gravel bed from which the city of Sioux Falls obtains its water supply. Neither of these propositions involves the drainage of agricultural lands. Drainage Ditch No. 1 and Drainage Ditch No. 2 had completely accomplished the object of draining the flats north of the city of Sioux Falls. If those drainage works were damaging other property interests, the remedy for the persons interested was to have the ditches abated as nuisances. Instead of pursuing this course, the Board of County Commissioners of Minnehaha county entered upon the construction of an elaborate system of water retaining works by which the water, which was collected from the flats into Drainage Ditch No. 1 and Drainage Ditch No. 2, could be retained until it could be passed off gradually into the Big Sioux river. To have abated Drainage Ditch No. 1 and Drainage Ditch No. 2 as nuisances, would have been to permit

the water, accumlating upon the flats, to remain there until it could flow off through its natural channel around the bends in the Big Sioux river, the same as it did before Drainage Ditch No. 1 and Drainage Ditch No. 2 were constructed. Instead, however, of doing this, the Board of County Commissioners proceeded to construct a new water retaining system by which the water could be retained upon the flats until it could gradually be drawn off, partly through the natural channel of the river and partly through a restricted passageway formed by the spillway and its attendant retaining walls and dams. In other words, the Board of County Commissioners proceeded to spend $250,000 and over for the purpose of accomplishing the same object that could have been accomplished by damming up the original ditches and leaving the flats in the same condition that they were before the original ditches were constructed. While some evidence was introduced, tending to show that a portion of the water collecting upon the flats passed off through the spillway, it remained in the evidence almost uncontradicted that the situation in the flats above the city of Sioux Falls is as bad as it was before any drainage ditches were constructed.

From all of the evidence in the record in this case, it would appear that the construction of the spillway and other works, under the organization of Drainage Ditch No. 1 and 2, was not for the purpose of draining agricultural lands but was for an entirely different purpose. This is the conclusion to which JUDGE ELLIOTT came in his opinion in the District Court, and upon this subject JUDGE ELLIOTT says, *Chicago, Rock Island and Pacific Railway Company vs. Risty,* 282 Fed. 364 (p. 378):

"There is another and further suggestion: I am of "the opinion that this reconstruction of the old spillway "without change of location, the repair of the break from "the river into the ditch, the cleaning of the ditch, the "change of the headgates where the flood waters are "taken from the river, everything that was done under "this pretended establishment of a new ditch, could not "have been viewed in the same light or as serving the "same purpose as the construction of the original ditches,

"because the thing that caused the board of commis-
"sioners to take any action with reference to the condi-
"tion that then existed was the danger that existed be-
"cause of the conduct of the water down through these
"two drainage ditches to and through this spillway. The
"danger that was threatened was not that the agricultural
"lands would not be drained, but that immense damage
"was threatened, that the course of the river was to be
"diverted to this cut-off, that great areas of land were
"threatened to be cut away by this river 100 feet deep,
"and that the water supply of the city was threatened
"to be taken away because of this drainage ditch and
"this imperfect spillway, because the water was to be
"taken from the river and all of the benefits of the river
"for several miles, through and around the city of Sioux
"Falls, would be destroyed. The power of the Northern
"States Power Company would be destroyed, by taking
"the water from the river. If it had not been for those
"conditions, for these threatened dangers, no action would
"have been taken; the ditches would have continued to
"function as they had functioned before. If the spill-
"way had been properly constructed originally, and if it
"had not proven inadequate, there would have been no
"cause for any action by the board in the year 1916.
"Every consideration that impelled action by the board
"was some phase of the threatened danger by reason
"of the inadequate and imperfect construction of these
"two ditches. Neither of these considerations that in-
"fluenced the action of the board *had anything to do with*
"*draining agricultural lands.*"

As has been shown, the legislature of South Dakota has never passed an act, putting into effect the authority vested by the constitution in the legislature to create drainage districts. As has also been shown, while drainage of agricultural lands can be carried on by county, township, and other municipal authorities, drainage for other "public uses" can only be constructed by drainage districts through their corporate authorities. It appearing from the record in this case that the work done under the organization of Drainage Ditch No. 1 and 2 was not for the purpose of agricultural lands but for other "public uses," it follows that the Board of County

Commissioners of Minnehaha county exceeded its authority in attempting to organize Drainage Ditch No. 1 and 2 and to construct the spillway and attendant works. Upon this proposition, JUDGE ELLIOTT, in his opinion, says:

"It may be said that to remedy these wrongs consti-
"tuted a public use, as referred to in the constitution of
"the state of South Dakota. Admitting that that is true,
"we are confronted with the proposition that there has
"been no legislation, conforming with the provisions of
"the constitution, authorizing the legislature to provide
"for the establishment of drainage districts and in the
"naming of officers with the powers therein referred to.
"If, therefore, any claim were made that the commis-
"sioners were acting under this authority, independent
"of the provision of law with reference to the drainage
"of agricultural lands, the answer is that the provision
"of the constitution is not selfexecuting, and that no leg-
"islation has been provided carrying this provision of
"the constitution into effect."

We therefore submit, that as the construction of the spillway and other attendant works was not a project for the drainage of agricultural lands, and as drainage for public uses other than the drainage of agricultural lands can, in South Dakota, only be carried on by the corporate authorities of drainage districts, and as the legislature of South Dakota has never authorized the organization of drainage districts with corporate authorities, all of the acts of the Board of County Commissioners of Minnehaha county, in attempting to organize Drainage Ditch No. 1 and 2, and in constructing the spillway and attendant works under such organization, were *ultra vires*, and that no apportionment of benefits or assessment for the cost of such construction can be made upon the property of Appellee.

V.

THE SOUTH DAKOTA DRAINAGE LAW IS UNCONSTITUTIONAL, SO FAR AS RESPECTS ASSESSMENTS OF RAILROAD PROPERTY, IN THAT IT PROVIDES FOR THE GIVING OF NO NOTICE WHATEVER OF THE APPORTIONMENT AND

EQUALIZATION OF BENEFITS TO RAILROAD COMPANIES.

In the preceding discussion of the South Dakota drainage law, we have considered the subject of the notice required by the statute to be given to property owners in general. We now desire to call the attention of the court to the provisions (or want of provisions) in the statute, relating to the notice to be given to railroad companies.

So far as concerns the statutory provisions relating to the notice to be given before a drainage project is entered upon by the Board of County Commissioners under the South Dakota drainage law, there is no difference as respects railroads and other property owners. The only notice, as has been seen, is a general notice to all persons "affected" by the proposed drainage project.

When we come to the matter of the notice given for the equalization of benefits, a singular situation is presented by the provisions of the statute in, that while the law provides for the publication of a notice to the owners of land, there is no provision whatever for the publication of any notice to railroad companies.

The provisions respecting the notice to be given of the equalization of proportion of benefits is found in Section 8463, South Dakota Revised Code, 1919. This section was evidently originally drafted for the purpose of providing a method for the equalization of assessments upon agricultural lands. The method, provided by the statute, for arriving at the assessment and equalization of benefits, is to take some "particular tract as a unit" and then with this tract as a measuring stick to determine, in number of units, the benefits received by the remaining tracts of land. This system is one which is in its nature applicable to agricultural lands, but which cannot well be applied to other classes of property, such as railroads and the property of municipalities. In the case of railroads, the taking of a particular tract of land as the unit, or measuring stick cannot be made to work out successfully unless the taxing authorities are content to assess railroads merely by virtue of the railroad ownership of the tracts of land comprised in the right of way within the assessment area. In other words, the

only way in which the proportion of benefits to railroad property could be determined, under the system provided by the statute, would be to consider merely the area of the right of way and proportion benefits to it the same as to the other agricultural land within the assessment area.

Evidently the legislature, in enacting the South Dakota drainage law, was not satisfied to have railroad companies and municipal organizations pay assessments for the construction of drainage works upon the same basis as the owners of agricultural lands, and in enacting Section 8463, South Dakota Revised Code, 1919, after providing the method for the assessment of the proportion of benefits upon lands by selecting some particular tract as a unit, there was added to the Section (something in the nature of an afterthought) the clause, "the pro- "portion of benefits which any county, city, town or "township may obtain by the construction of such drain- "age to highways or otherwise, and *the benefits which "any railroad company may obtain for its property by "such construction,* shall be fixed and equalized together "with the proportion of benefits to tracts of land." No method of arriving at the assessment and equalization is provided by the statute. The "particular tract as a unit" system is selfevidently inapplicable in such cases but the legislature has provided nothing to take its place. The law gives the Board of County Commissioners the naked power to fix and equalize the proportion of benefits to counties, cities, towns, townships, and railroad companies, but provides no method upon which the assessment and equalization can be based.

The notice of equalization of proportion of benefits, provided by Section 8463, "shall state the route and "width of the drainage established, a description of each "tract of land affected by the proposed drainage and the "names of the owners of the several tracts of land as "appears from the records of the office of the Register of "Deeds, at the date of the filing of the petition, and the "proportion of benefits fixed for each tract of property, "taking any particular tract as a unit, and shall notify "all such owners to show cause why the proportion of "benefits shall not be fixed as stated." This is a notice

directed solely to the owners of tracts of land within the assessment area. It does not purport to be a notice to a county, city, town, township, or railroad company respecting the assessment or the equalization of proportion of benefits upon the property belonging to any of such organizations. The statute authorizes the Board of County Commissioners to assess the "proportion of benefits" which any county, city, town or township may obtain by the construction of drainage to highways or otherwise, but does not provide for the giving of any notice to the municipality affected. With respect to railroad companies, the statute authorizes the Board of County Commissioners to "fix and equalize" the "benefits", but seems to make a distinction between railroad property and other classes of property by using the words "proportion of benefits" with respect to other property, but the term "benefits" with respect to railroad property. This would seem to indicate that it was not the intent of the legislature that railroad companies should be assessed in the same proportionate manner as are agricultural lands, or as are counties, cities, towns or townships.

The fact, however, remains that the legislature of South Dakota has made no provision whatever for the giving of notice to railroad companies, cities, towns, or townships, of the assessment or equalization of benefits supposed to be derived from the construction of the drainage works. It consequently follows that as far as railroad companies, counties, cities, towns, and townships are concerned, the statute provides for no notice whatever, at any stage of the proceeding, of the assessment or of the tax. Even if the South Dakota drainage statute should be held valid as far as respect the matter of notice to the owners of agricultural lands, it is clearly unconstitutional as to railroads and municipalities by reason of its failure to provide for any notice whatever at any stage of the proceedings. It clearly comes within the inhibition of the Fourteenth Amendment and within the doctrine laid down by the Supreme Court in numerous cases.

Central of Georgia Railway Company vs Wright, 207 U. S. 127,

Londoner vs Denver, 210 U. S. 373,
Soliah vs Heskin, 222 U. S. 522,
Turner vs Wade, 254 U. S. 64

The South Dakota drainage statute having failed to provide for the giving of any notice, at any stage of the proceedings prior to the time the tax becomes absolute, to railroad companies or municipalities, any assessment or tax imposed upon each corporation or municipality under the statute is without due process of law and void.

VI.

THE ATTEMPTED ASSESSMENT UPON THE PROPERTY OF APPELLEE WAS ARBITRARY, UNJUST, AND ILLEGAL, AND CONSTITUTES A DISCRIMINATION SO PALPABLE AND ARBITRARY AS TO AMOUNT TO A DENIAL OF THE EQUAL PROTECTION OF THE LAW.

Under the proposed assessment of benefits, out of a total of 32,549.62 units there were assessed against Appellee 839.45 units, upon which the assessment of Appellee would be in excess of $7,500. The methods used by the Board of County Commissioners in arriving at these figures is disclosed by the testimony of H. Rettinghouse, a civil engineer employed by the Board of County Commissioners to make a survey of the assessment area, and who made the computations contained in the assessment of benefits adopted by the Board. Mr. Rettinghouse was called by Appellants as a witness and upon the trial testified (Record pp. 350-3951), as follows:

"We used this unit selected as one and compared "the other real estate with it. It was decided by the "Board that the acre in question was worth one hundred "dollars prior to the improvements and that it was "worth one hundred twenty-five dollars subsequent to the "improvements. Therefore the actual value of benefit "to the unit selected was twenty-five dollars. All the "agricultural land was assessed in relation to this unit. "Many of the lands were only 30 or 40 per cent depend- "ing upon the amount of benefit derived, as compared "with this unit, being one hundred per cent. There were "other lands that were as high as three hundred and fifty

"per cent of this unit. I am familiar with the cost of "construction and upkeep of highways. In arriving at "the benefit to the highways within this drainage area "we estimated the benefit in this way. There is a certain "amount of annual maintenance necessary for any road, "and there is more than that amount under flood con- "ditions. That is to say, a road that is periodically "flooded as against a road that never is flooded. The "difference in the estimated cost of maintenance was "capitalized, or represented the interest on a certain "sum of money, and we consider the capitalized portion "as a real benefit. We then, after obtaining that re- "sult after making a great many calculations, taking "into consideration the various locations, some of them "benefitted more than others.

"We divided the amount arrived at by the value of "the unit of $25, thereby obtaining the number of units "as a proportional benefit for these roads. The sum "we divided by the unit represented the capitalized value "to that part of the highway; we applied the same "method to the streets and highways of the City of "Sioux Falls. We did not apply the acreage basis to "the city property, excepting possibly the grounds where "the waterworks are located. In applying the benefit "to the unit and what the Board took into consideration "as elements of benefit to the Milwaukee Railway Com- "pany, we took into consideration the fact that in the "first place there were practically three elements. First "was the right-of-way on the acreage basis, which was "estimated in proportion to the adjacent lands. Second, "that it was possible to shorten or abandon certain "bridges. In order to determine the benefits derived "therefrom is simply a mathematical proposition. It "costs a certain amount of money each year in order "to maintain a bridge, whether it is a pile bridge or a "steel bridge. We know how long these structures will "last. We figure the cost of a bridge and divide it by "the number of years in order to get the amount that "is necessary to be expended each year for replace- "ment. Taking the amount in dollars and cents multi- "plied by the length of the bridge and divide that and "capitalize that at 7 per cent, which is the usual rate

"of interest, and that determines the amount of benefit. "This is the second element. The third element is "the fact that by reason of the flooding of the territory "in which railroads are located, washouts often occur. "We obtained data and from my personal knowledge and "experience I have a very good idea what it costs to re- "pair washouts periodically appearing and we estimated "as close as possible how much it would amount to every "year and capitalized that amount again.

"Again as an additional element, a road-bed is solid- "ified or made stronger by not being subject to floods. "A road-bed that is constantly or for great lengths of "time subjected to submersion is certainly weakened, "and again, so far as humanly possible, we figured the "amount of benefits in dollars and cents and after get- "ting all of these results or capitalized amounts, we di "vided that by twenty-five as our measure and determined "the number of units of benefit. That system and general "method and plan was used to determine the amount "of benefits that each railroad received from these "separate elements."

The statement of Mr. Rettinghouse, the engineer who made the assessment of benefits for the Board of County Commissioners of Minnehaha county, is upon its face sufficient to demonstrate the fact that in arriving at the proportion of benefits to be assessed against Appellee, the other railroad companies, and the city of Sioux Falls, the Board used as a basis for arriving at the assessment a method so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality. The assessment was clearly upon a fanciful view of benefits to be derived by the railroad companies from the drainage project. The basis used was not authorized by any provision of the South Dakota drainage law but was evolved from the inner consciousness of the County Commissioners of Minnehaha county and of the civil engineer employed by them. The basis was so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality. It constituted a dis-

crimination so palpable and arbitrary as to amount to a denial of the equal protection of the law.

We do not deem it necessary to discuss this proposition at further length. In the recent case of *Kansas City Southern Railway Company vs Road Improvement District No. 6*, 256 U. S. 658, this Court has emphatically condemned similar methods of assessment.

We respectfully submit, that even if the South Dakota drainage were constitutional and there were no other valid objections to the proceedings of the Board of County Commissioners of Minnehaha County in the organization of Drainage Ditch No. 1 and 2, and in the construction work done thereunder, the assessment made upon Appellee cannot be sustained for the reason that it is so arbitrary and unjust and so confessedly founded upon a fanciful basis as to deprive Appellee of the equal protection of the law.

VII.

THE DECREE MUST BE SUSTAINED REGARDLESS OF WHETHER THE DRAINAGE DITCH NO. 1 AND 2 BE REGARDED AS AN ORIGINAL DITCH PROCEEDING OR AS A MAINTENANCE AND REPAIR PROPOSITION.

Section 2, ch. 134, Laws of 1907; Section 8459 R. S. 1919, provides for the initiation of the proceedings by filing a petition. Section 4, ch. 134, Laws of 1907, Section 2, ch. 102, Laws of 1919; Section 8461 R. S. 1919, provides for notice of hearing thereof given to property owners, and is the only notice given prior to the establishment of the ditch. This notice is, therefore, jurisdictional. We have already contended that this statute, not requiring a description of the property claimed to be affected, does not satisfy the constitutional requirements of due process of law. All parties affected have a right to be heard upon the question of the establishment of the proposed drainage. They must have notice that such property will be claimed to be affected, otherwise the major step in the proceeding for which they are ultimately bound to pay, has been taken without jurisdiction of the person or property.

If the said Section R. S. 8461 requires a description of the property to be affected, then the notice itself is insufficient. Upon this theory, perhaps, the decision of the trial court was based. The notice of the hearing upon the petition for the establishment of the ditch 1 and 2 refers generally to the lands affected thereby. There is nothing to indicate that the new ditch would extend beyond or occupy a position different, from the old ditches 1 and 2. The evidence shows that there was no change or extension. The lands therefore presumed to be affected by the new ditch, if held to be a new ditch, or by the improvement of the old ditches, could not, in the absence of the description in the notice, be deemed or expected to include other lands than those included within the drainage area of the old ditches 1 and 2. There was no such description and nothing upon which it could have been apprehended that the area was intended to be extended. There was, therefore, want of notice in fact to the owners of property not included within the original drainage area. The undisputed evidence is that a considerable property of the Appellee not included in the original area, is attempted to be assessed under the guise of a new drainage ditch and this without any notice that the old drainage area was to be extended. There was, therefore, a failure to give notice, jurisdiction was not acquired of the proposed added area affected by the injunction and decree of the trial court. The reference made in the Appellants' brief to the Gilseth case may be disposed of by this situation; the lands involved in the Gilseth case were in the original drainage area, while the assessments sought here to be enjoined by the court affect areas not included within such area. The court by its decree in this case excepted from the effect of the decree the right to make an assessment upon the railroad property within the original drainage area.

The court was, therefore, justified in finding that the proposed assessment upon property not included within the original drainage area was an afterthought for the purpose of raising money. It matters not whether such determination be upon the theory that this was an attempted establishment of the new ditch or whether such proceedings for the new ditch was a mere subterfuge for

raising money to repair and improve the old ditch. The decision of the court equally sustains either theory.

As the court properly determined, no attempt was made to take the statutory steps for the repair, improvement or continuation of the old ditch, but an attempt was made to follow statutory requirements to establish a new ditch—hence it matters not whether this was a mere subterfuge to raise money or any ineffectual attempt to establish a new ditch.

Appellants challenge the record on account of the insufficiency of the facts to support the findings and conclusions of the trial court affirmed by the court of appeals. The proposition as to the amount in controversy, that the proceedings and proposed assessments are arbitrarily determined without notice of hearing in advance of a determination of benefits upon a hearing, as well as the amount in controversy, is fully presented and made to appear from Exhibit B attached to bill of complaint, from which it appears that before any notice of equalization or the apportionment of benefits, it had already been arbitrarily determined by the Board that the different classes of property as different in character and as differently affected, if at all, as the agricultural lands from either by the so-called drainage should be assessed a certain percentage of the cost. There was no rule of comparisons prescribed by statute, or adopted by the Board, but it had already been determined that 14.5% should be assessed against the railroads, 33.4% against farm lands, 1% on city lots, 9.7% on city of Sioux Falls and 16.5% on the Northern States Power Company. This was a percentage of the $309,221.40 to be raised. It was then proposed that by Exhibit C attached to the bill of complaint that the various railroads should be assessed upon certain property in specific amounts. Upon this a hearing was proposed to be had. This situation is fairly conceded by argument of Appellants on page 80, paragraph III wherein Appellants say: "But passing that, it is "plain on this record so far as the present appeal is "concerned there is more than $1,000.00 in controversy "* * *. It is admitted that no assessment has yet been "made and not a dollar of tax yet collected. There has "been an expenditure of over $250,000; drainage warrants

"for that amount are outstanding, and they must be "paid if at all by collecting the assessment that this in- "junction stopped. The tentative apportionment against "the Appellees is roundly, $112,000. (Page 13 in N., P., "R., S., O. and M.) But on the point under discussion "little attention need be paid that fact. There is at this "time more than $1,000.00 in dispute no matter how this "$112,000.00 is treated." In other words, Appellants concede that by the apportionment already made, the sum of $112,000.00 must be raised upon the property of the Appellees and that by no course of reasoning can it be determined that less than $1,000.00 is involved in each of the appeals.

By the same course of reasoning, not only had the amount been determined, but also a division of the expenses as between different classes of property. The amount to be raised upon railroads had already been determined as 14.5% of the entire expense, regardless of benefits. However that be apportioned, neither could be less than $1,000.00. The testimony shows the dissimilarity of the property and the theory of the arbitrary assessment so that it clearly appears from the pleadings and the proof that not only more than $3,000.00 is involved but that the amount to be borne by the railroads had already been determined in advance and the apportionment, according to Appellants' concession, is to be made among the railroads of the 14.5%. Consequently these Appellees have been deprived of their right to be heard upon the controlling and important question, that is, as to the amount and basis of the assessment against railroads.

VIII.

THE DISTRICT COURT POSSESSED JURISDICTION TO ENTERTAIN AND DETERMINE THIS SUIT.

Counsel for Appellants have filled a great portion of their brief with arguments upon objections to the jurisdiction of the District Court in this suit. We do not deem it necessary to take up these various objections and discuss them *seriatum*. The questions at issue, involving as they do the constitutionality of the Federal

Constitution, together with the amount involved and the diversity of citizenship, are amply sufficient to sustain the jurisdiction of the court.

Counsel for Appellants strenuously contend that Appellee should have waited until after the Board of County Commissioners of Minnehaha county had finished the equalization of benefits before instituting this suit. This case is, however, not one in which any such delay of proceedings was necessary. The law, under which the Board of County Commissioners was proceeding, was unconstitutional. The Board was a trespasser from the very commencement of the assessment proceedings. After the Board of County Commissioners had committed one illegal act, in making the assessment of benefits, it was certainly not incumbent upon Appellee to wait before instituting legal proceedings until after the Board had committed further illegal acts. Jurisdiction to maintain a suit to restrain the commission of a tort becomes fixed as soon as the first tortuous step has been taken by the tort feasor. It is not necessary for the person injured to wait until after the threatened damage has been completed. The Board of County Commissioners of Minnehaha county invaded the rights of Appellee when it made the assessment of benefits, and the right of action then became complete.

In our view of the issues involved in this case, the points which we have raised in the foregoing discussions in this brief are a sufficient answer to all questions concerning the jurisdiction of the court.

IX.

APPELLEE IS NOT ESTOPPED BY ITS ACTS FROM MAINTAINING THIS SUIT.

In their brief, counsel for Appellants make a somewhat elaborate attempt to show that Appellee is estopped from maintaining this suit. It was in evidence that the railroad tracks of the Appellee extend through the flats north of the city of Sioux Falls, and are in some places not far distant from the drainage ditch.

All the evidence of estoppel contained in the records amounts to is, that Appellee operates a railroad through

the flats upon which the ditches were constructed. There is not a scintilla of evidence that Appellee or any of its officers ever consented to the drainage construction or approved of it in any manner whatsoever. It is, therefore, a sufficient answer to the estoppel proposition, that there is no evidence of any facts which would create an estoppel.

A further answer to the estoppel plea is this: Under the South Dakota drainage law, no notice was required to be given Appellee until the assessment of benefits had been made. Up to that time, Appellee had no knowledge that its property, situated outside of the original assessment areas of Drainage Ditch No. 1 and of Drainage Ditch No. 2, was "affected" by the drainage construction, or would be assessed for the cost thereof (it will be remembered that in the decree in this case, an injunction was issued in favor of Appellee only as to its property outside of the original assessment areas, and that as to the property within such areas the decree is without prejudice to the rights of Appellee. In this proceeding, therefore, only the property outside of the original assessment areas is to be taken into consideration). We do not concede that, under the South Dakota statute, any notice was ever given to Appellee that an assessment had been made upon its property for the statute, as has been seen, does not provide for the giving of any notice whatever to railroad companies. If, however, it should be conceded, for the sake of argument, that the notice published by the Board of County Commissioners, after the assessment had been made, was a notice to Appellee, it was the first notice that Appellee had ever received. All of the acts under which an estoppel is claimed by Appellants were done during the time of the construction work and long prior to the making of the assessment of benefits and to the publishing of the equalization notice.

We respectfully submit that even if the acts set forth in the record were sufficient to constitute an estoppel upon the part of Appellee that such acts could not constitute an estoppel for the reason that, at the time they were done, Appellee had received no notice that its property within the new territory sought to be assessed was within the assessment area of Drainage Ditch No. 1 and 2, and

had no knowledge that an assessment was in contemplation. We deem it unnecessary to discuss the estoppel proposition at further length.

X.

IN CONCLUSION

In the record of this case there is ample evidence of the greatest ignorance, ineffeciency, and extravagance upon the part of the Board of County Commissioners of Minnehaha county in the construction of the spillway, retaining walls, dams, and other works under the organization known as Drainage Ditch No. 1 and 2. Plans for the work were adopted and then the adoption rescinded. Plans and specifications for the construction of a spillway were obtained and bids advertised for and received for the construction in accordance with the plans. The bids were rejected upon the ground that they were too high, the plans were then thrown into the waste basket and contractors were employed to construct a spillway upon the cost-plus plan, the contractors to receive compensation for the material and labor used and, in addition, a profit of nine per cent. The construction of the spillway was entered upon without any plans therefor being made, and the plans were drawn after the spillway had been completed, or practically completed. The cost of the spillway so constructed was approximately $150,000, or more than three hundred per cent of the amount of the bids which were rejected by the Board as being too high. The spillway and other works, when completed, have failed to accomplish successfully the drainage of the flats north of the city of Sioux Falls. The property owners in the flats are in practically the same, or possibly in a worse condition, than they were prior to the original construction of Drainage Ditch No. 1 and of Drainage Ditch No. 2. The works constructed, under the organization of Drainage Ditch No. 1 and 2, simply operate to retain the surface water upon the flats and not to drain it off. They are successful in preventing the diversion of the channel of the Big Sioux river and in preventing the draining of the gravel bed from which the city of Sioux Falls obtains its water supply. Those two objects have successfully been accomplished but the same results could have

been attained by placing, at a trifling expense, earthwork dams in proper places along the course of Drainage Ditch No. 1 and of Drainage Ditch No. 2. The spillway and other works, as completed in Drainage Ditch No. 1 and 2, have operated to destroy the efficiency of the original ditches as drainage propositions, but have accomplished nothing that could not have been accomplished at a trifling expense by simply abandoning the old ditches and preventing the flow of water through the bluff and into the Big Sioux river below the falls.

The Board of County Commissioners of Minnehaha county, in the work done by them on Drainage Ditch No. 1 and 2, seem to have acted at haphazard and without any well defined plan of procedure. The one thing which they have accomplished successfully has been to expend upwards of $250,000 upon works which are useless as a drainage proposition, and, with interest, the entire indebtedness which has now accumulated is in excess of $300,000. The intervening Appellants, who hold the drainage ditch warrants issued by the Board of County Commissioners of Minnehaha county upon Drainage Ditch No. 1 and 2, are certainly in an unfortunate position. That they are in a fair way to lose their investment is, however, no reason why Appellee, an "innocent bystander," should be "made the goat" and forced to pay for the errors, mistakes, and wild extravagances of the Board of County Commissioners of Minnehaha county. It was not through any fault of Appellee that Drainage Ditch No. 1 and 2 was organized and the spillway and other works constructed. It is in no manner responsible for the acts of the Board of County Commissioners or for the mistakes of judgment of the intervening Appellants, in investing in the warrants.

In conclusion, we submit, that for the reasons which we have hereinbefore set forth, the South Dakota drainage law is unconstitutional under both the federal and the state constitutions; that the proceedings under which Drainage Ditch No. 1 and 2 was organized were illegal and void; that the work done under such organization was without authority of law; that the attempted assessment upon the property of Appellee is founded upon a fanciful, arbitrary, and illegal basis; that the District Court pos-

sessed jurisdiction to hear and determine this suit; and that, for these and the other reasons hereinbefore set forth, the decree of the District Court and the decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

C. O. BAILEY,
J. H. VOORHEES,
T. M. BAILEY,
Solicitors for Appellee.

R. L. KENNEDY, *of Counsel.*

APPENDIX A

PROVISIONS OF SOUTH DAKOTA CONSTITUTION

SECTION 2 OF ARTICLE VI.

§ 2. No person shall be deprived of life, liberty or property without due process of law.

SECTION 13 OF ARTICLE VI

§ 13. Private property shall not be taken for public use, or damaged, without just compensation as determined by a jury, which shall be paid as soon as it can be ascertained, and before possession is taken. No benefit which may accrue to the owner as the result of an improvement made by any private corporation shall be considered in fixing the compensation for property taken or damaged. The fee of land taken for railroad tracks or other highways shall remain in such owners, subject to the use for which it is taken.

SECTION 6 OF ARTICLE XXI

§ 6. The drainage of agricultural lands is hereby declared to be a public purpose and the legislature may provide therefor, and may provide for the organization of drainage districts for the drainage of lands for any public use, and may vest the corporate authorities thereof, and the corporate authorities of counties, townships and municipalities, with power to construct levees, drains and ditches, and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this state, by special assessments upon the property benefited thereby, according to benefits received.

APPENDIX B

SOUTH DAKOTA DRAINAGE STATUTES

(NOTE: The section numbers at the beginning of each paragraph are those of the South Dakota Revised Code of 1919. The references at the end of each paragraph are to the Session Laws of the various years. The paragraphs as printed constitute the law as it stood at the time of the transactions involved in this suit.)

§ 8458. POWER OF COUNTY COMMISSIONERS. The Board of County Commissioners, at any regular or special session, may establish and cause to be constructed any ditch or drain; may provide for the straightening or enlargement of any watercourse or drain previously constructed, and may provide for the maintenance of such ditch, drain or watercourse whenever such ditch, drain or watercourse shall be conducive to the public health, convenience or welfare, or whenever the same shall be for the purpose of draining agricultural land. (§ 1, ch. 98, 1905; § 1, ch. 134, 1907).

§ 8459. PETITION. Such board shall act only upon a written petition signed by one or more owners of land likely to be affected by the proposed drainage. Such petition shall set forth the necessity for the drainage, a description of the proposed route by its initial and terminal points and its general course, or by its exact course in whole or in part, and a general statement of the territory likely to be affected thereby. The petition shall be accompanied by a bond with sufficient sureties to be approved by the county auditor, conditioned to pay all expenses incurred in case the board does not grant the petition or the same is denied on appeal. Such petition may be presented at any regular or special meeting of the board, and, if sufficient in form, shall be ordered filed with the county auditor. (§ 2, ch. 98, 1905; § 2, ch. 134, 1907).

§ 8460. INSPECTION OF PROPOSED ROUTE. It shall be the duty of such board to act promptly upon all drainage petitions. Upon filing such petition the county auditor shall transmit a copy thereof to the state engineer, who, together with the board of county commissioners shall as soon as practicable, inspect the proposed route and, if in the opinion of such board and the state engineer it is necessary, the board shall cause a survey of the proposed drainage to be made by such competent surveyor as such board may select, but such survey shall be under the general supervision of the state engineer. Such survey shall primarily be for the purpose of aiding the board in determining the necessity of the proposed drainage, but may be a complete survey such as will be required for the construction of the proposed drainage and

assessment of its cost, or as much less as the board may require. Such survey may extend to other lands than those affected by the proposed drainage for the purpose of determining the best practical method of draining the entire section of country of which the lands proposed to be drained, or a portion of them, are a part. For the purpose of inspection or surveys, the county commissioners, surveyors or their employes may enter upon any lands traversed by the proposed drainage or in their judgment likely to be affected thereby. The county auditor shall promptly furnish the state engineer with a copy of the surveyor's report mentioned in the succeeding section and of all maps and plans filed by such surveyor and also with a copy of such further files as the state engineer may ask for. In case the drainage is established the preparation of plans and specifications upon which the contract of construction is to be awarded and also the work of construction, shall be under the supervision of the state engineer. It shall be the duty of the state engineer to render such assistance and advice to the board of county commissioners in regard to such drainage as the duties of his office will permit and he shall be reimbursed by such board for his expenses incident thereto; provided, that in case of minor ditches the state engineer shall not be required to attend with the board of county commissioners at the first inspection, nor to perform subsequent services if in his judgment it shall not be necessary for him so to do. (§ 3, ch. 98, 1905; § 3, ch. 134, 1907; § 1, ch. 102, 1909).

§ 8461. SURVEYOR'S REPORT — NOTICE OF HEARING. The surveyor shall report in writing to the board of county commissioners and his report shall be filed with the petition. After personal inspection or after the receipt of the surveyor's report the board shall de termine the exact line and width of the ditch, if the same shall not be fixed in the petition, and shall file its determination with the petition. The board shall then fix a time and place for the hearing of the petition and shall give notice thereof by publication at least once each week for two consecutive weeks in a newspaper of the county, to be designated by the board, and by posting copies of such notice in at least three public places near the route

of the proposed drainage. Such notice shall describe the route of the proposed drainage and the tract of country likely to be affected thereby in general terms, the separate tracts of land through which the proposed drainage will pass and give the names of the owners thereof as appears from the records of the office of the register of deeds on the date of the filing of the petition, and shall refer to the files in the proceedings for further particulars. Such notice shall summon all persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed, and shall summon all persons deeming themselves damaged by the proposed drainage or claiming compensation for the lands proposed to be taken for the drainage to present their claims therefor at such hearing. (§ 4, ch. 98, 1905; § 4, ch. 134, 1907; § 2, ch. 102, 1909).

§ 8462. HEARING ON PETITION. At such hearing any person interested may appear and contest the statements of the petition and matters set forth in the surveyor's report and the finding of the board as to width and route. The petitioners in like manner may be heard in support of the petition. After full hearing the drainage may be established along the line set forth in the petition or in the finding of the board prior to the hearing, or the board may vary the route thereof, or its width, as deemed practicable or necessary. If the board deems it best to vary the route, or to materially change the initial or terminal points of such proposed drainage so that it will pass through other lands than those described in the notice of hearing, or to increase the width of lands to be taken for the proposed drainage, the board shall adjourn the hearing and give the owners of such lands notice as in case of the original hearing. No open ditch shall be constructed within the limits of any public highway except where the topography of the country makes such construction advisable and in such case the ditch shall be located at a sufficient distance from the center of such highway to permit a roadway of standard width being constructed. If the proposed drainage does not give sufficient fall to drain the lands sought to be drained or will not properly take care of the waters collected by

such drainage, the same shall be extended so as to secure the drainage or properly dispose of the water. The hearing in any such case shall be adjourned and notice given to all parties newly affected as in case of the original hearing. When the board of county commissioners shall have fully heard and considered such petition, and all matters in opposition to or in support of the same, it shall, if it finds the proposed drainage not conducive to the public health, convenience or welfare, or not needed or practicable for the purpose of draining agricultural lands, deny such petition, the petitioners to be jointly and severally liable for the costs of the proceeding, the same to be recovered in a civil action. If it finds the drainage proposed or any variation thereof conducive to the public health, convenience or welfare, or necessary or practicable for draining agricultural lands, it shall establish the drainage and shall assess the damages sustained by each tract of land or other property through which the same shall pass and the damages as compensation for the land taken for the route of such drainage. Any person interested may be heard in the matter of damages or compensation for land and the determination of the board of county commissioners shall be final unless an appeal therefrom, as provided in this article, shall be taken, failure to prosecute such appeal or to appear and contest an award of damages by the board to be deemed conclusively a waiver of any such damages or compensation for land taken or of any claimants right to have the same assessed by the jury. Such drain shall be given a name and the proceeding thereafter taken shall be recorded and indexed in a book kept for that purpose in the auditor's office. (§ 5, ch. 98, 1905; § 5, ch. 134, 1907; § 3, ch. 102, 1908; § 1, ch. 205, 1917).

§ 8463. EQUALIZATION OF BENEFITS. After the establishment of the drainage and the fixing of the damages, if any, the board of county commissioners shall fix the proportion of benefits of the proposed drainage among the lands affected, and shall appoint a time and place for equalizing the same. Notice of such equalization of proportion of benefits shall be given by publication at least once each week for two consecutive weeks in a newspaper of the county to be designated by the

board, and by posting copies of such notice in at least three public places near the route of the proposed drainage. Such notice shall state the route and width of the drainage established, a description of each tract of land affected by the proposed drainage and the names of the owners of the several tracts of land as appears from the records of the office of the register of deeds at the date of the filing of the petition and the proportion of benefits fixed for each tract of property, taking any particular tract as a unit, and shall notify all such owners to show cause why the proportion of benefits shall not be fixed as stated. Upon the hearing of the equalization of the proportion of benefits, the board of county commissioners shall finally equalize and fix the same according to benefits received. The proportion of benefits which any county, city, town or township may obtain by the construction of such drainage to highways or otherwise, and the benefits which any railroad company may obtain for its property by such construction, shall be fixed and equalized together with the proportion of benefits to tracts of land. Benefits to be considered in any case shall be such as accrue directly by the construction of such drainage or indirectly by virtue of such drainage being an outlet for connection drains that may be subsequently constructed. (§ 6, ch. 98, 1905; § 6, ch. 134, 1907; § 4, ch. 102, 1909).

§ 8464. ASSESSMENTS. After the equalization of the proportion of benefits the board may make an assessment against each tract and property affected, in proportion to the benefits as equalized, for the purpose of paying the damages and the cost of establishment thus far incurred or to be incurred. The cost of establishment shall include the costs of the service of the board of county commissioners, surveyors and assistants, plans and profiles, publication and filing, and other fees, interest on bonds issued or to be issued and all other expenses incurred or to be incurred that in any way contributed or will contribute to the establishment or construction of the drainage. At the expiration of thirty days after the making of such assessment, a copy thereof certified by the county auditor shall be filed by him with the county treasurer, but before the same is filed a notice shall be given by the board of the time when the same

will be so filed, by publication at least once each week for two consecutive weeks in a newspaper in the county to be designated by the board and by posting copies of such notice in at least three public places near the route of such drainage. Such notice shall also contain a description of the property assessed, the name of the owner as it appears in such assessment and the amount of each assessment, together with the amount assessed against the county or any city, town, township or railroad company, and shall also give the date when the assessment will become delinquent, together with the amount of penalty which will then accrue and the date from which interest will begin to run.

From the time of filing such certified copy of assessment in the treasurer's office, the same shall be due and payable and shall be valid and perpetual liens upon the respective tracts so assessed against all persons or governments except the state and the United States and, if not paid within ten days, a penalty of five per cent shall attach thereto and such assessment shall bear interest from the date of the order of the assessment at a rate not to exceed eight per cent per annum payable annually. Such assessment shall be paid to and received by the county treasurer and paid over to the holders of the assessment certificates or upon the order of the board of county commissioners. The board of county commissioners may issue separate assessment certificates against each tract assessed for the amount of the assessment thereon, and may sell the same at not less than par value with all accrued interest, or may contract to pay for the construction of such drainage with such assessment certificates or with warrants. Such assessment certificates shall refer to the record in the office of the county auditor of the order of assessment and of the filing of a copy thereof in the county treasurer's office, shall transfer to the holder all interest, claim, or right in or to such assessment, bear the same rate of interest, carry the lien of such assessment and be enforcible as provided by law. Assessments for drainage or installments thereof shall be enforced by the county treasurer by sale of the property at the annual tax sale, provided that no such assessment or installment thereof shall be included in the sale of any

given year unless the same shall have been delinquent on or before August first of each year. The provisions of Chapters 7, 8, 9, Part 9 of this title shall apply to the enforcement of the lien or drainage assessments so far as such provisions are applicable, except that a treasurer's deed issued upon a delinquent drainage assessment shall recite the fact that the title conveyed is subject to all the claims which the state or any political subdivision thereof may have thereon for annual taxes.

Whenever an assessmnet for drainage or an installment thereof has been made against any county, city, town or township, as provided in this chapter, the officers of such county, city, town or township, whose duty it is under the law to make the levy of taxes, shall at the time of the next annual tax levy after the making of such assessment make a levy for drainage purposes of such an amount as shall be necessary to pay such assessment, and return the same to the proper officers as provided by for the other taxes, and such levy and tax shall be enforced and collected in all respects as provided by law for other taxes; provided, that any surplus remaining in any fund at the close of any year may be used by any township to pay and apply on any drainage assessment, as provided herein; provided, further, that in unorganized townships the county commissioners shall be authorized to pay for drainage as provided herein out of any money belonging to such unorganized township, and each succeeding year a like levy shall be made by such authorities until the whole of such assessment for drainage is paid. Instead of making an annual assessment for the purpose of paying the damages allowed in any drainage proceeding and the costs of establishment and construction, the board of county commissioners may issue warrants payable only out of the assessments to be subsequently made, the same to bear interest at a rate not to exceed eight per cent per annum payable annually, and may sell such warrants at not less than the face value thereof and shall with such money so raised pay any damages allowed and cost of establishment and construction. In making assessment for such drainage such warrants and the cost of issuing the same shall be included in the costs of the drainage. (§ 7, ch. 98, 1905; § 7, ch. 134, 1907; § 5, ch. 102, 1909;

ch. 130, 1911, and as amended by § 1, ch. 46, Laws of Second Special Session of the Sixteenth Session of the Legislature of South Dakota 1920).

§ 8465. BIDS—SPECIFICATIONS—CONTRACTS. Whenever sufficient money shall have been collected the damages occasioned by the construction of such drainage and fixed as herein provided shall be paid and thereupon the board of county commissioners shall proceed to construct such drainage and shall let contracts for the construction of the same. Such contracts may require the contractors to take their pay in assessment certificates or in warrants to be thereafter issued. The contract may be for the construction of the entire drainage or for any portion thereof, and shall be let upon competitive bids, the board reserving the right to reject any and all bids. The lowest responsible and capable bidder shall be accepted but if any landowner affected be an equally low, capable and responsible bidder with a nonowner of the lands affected the former shall be preferred. When any contract shall be let the contractor shall give a bond in such sum as shall be approved by the board of county commissioners, conditioned for the faithful performance of his work and full completion of his contract to the satisfaction of such board. For the information of the contractors in bidding upon the proposed drainage, full plans and specifications shall be filed in the office of the county auditor. If in the judgment of the board of county commissioners the entire drainage or any part thereof can be constructed for less money than the amount of any bid submitted therefor, the board may cause such drainage to be constructed, hire the necessary labor and purchase all necessary material for such construction, without letting contracts therefor. Contracts for building bridges or culverts rendered necessary by the construction of such drainage may be let separately and after the drainage is completed. The cost of constructing such bridges or culverts shall be charged in the first instance as part of the cost of drainage and thereafter such bridges and culverts shall be maintained as part of the highway; provided, that the cost of removing, repairing, enlarging or replacing bridges and culverts already existing across the line of a proposed drainage ditch shall

not be charged as a part of the drainage. (§ 8, ch. 98, 1905; § 8, ch. 134, 1907; § 6, ch. 102, 1909; ch. 206, 1917).

§ 8466. BOARD MAY EXTEND TIME FOR COMPLETION OF CONTRACT. The board of county commissioners shall have power to grant a reasonable extension of time for the completion of any contract. When any contract shall not be finished within the time specified or to which it may be extended, such board may in its discretion at any time thereafter relet such unfinished portion of any part thereof after not less than five days' notice thereof to the lowest responsible bidder and shall take security as for the original contract. The cost of completing such parts, over and above the original contract price and the expense of notices and reletting, shall be collected by the board from the first contractor; provided, that in no case shall the board forfeit and annul a contract without five days' notice to the contractor, if found, and if not found then by written notice left at his last known place of residence in the county. (§ 9, ch. 98, 1905; § 9, ch. 134, 1907).

§ 8467. ASSESSMENTS FOR FURTHER COSTS. At any time after the damages arising from the establishment and construction of such drainage are paid and the lands for such drainage are taken, assessments may be made for further costs and expenses of construction. If the contractors are required and agree to take assessment certificates or warrants for their services, assessments need not be made until the completion of the work when an assessment shall be made for the entire balance of cost of construction, including the services of the board of county commissioners, surveyors and assistants, plans and profiles, publication and filing, and other fees, interest on bonds issued or to be issued and all expenses of every kind and nature that contribute to the establishment and construction of the drain and notice of such assessment shall be given by the board of county commissioners in all respects as provided for the first assessment. And such assessment and the certificates issued thereon shall be in like manner perpetual liens upon the tracts assessed, interest-bearing and enforcible as such first assessments and certificates. The board of county commissioners may sell such assessment certificates at not

less than par and thereby raise funds to defray the cost of establishment and construction. If there be no damages to be paid before taking the lands for such drainage, or if the damages have been paid by the proceeds of the sale of warrants only one assessment need be made. In any case, in the discretion of the board, several assessments may be made as the work progresses. Assessments shall be paid to the county treasurer and the money therefrom shall be paid by him to the holders of assessment certificates, or upon the order of the board of county commissioners for the purpose of the particular drainage. (§ 10, ch. 98, 1905; § 10, ch. 134, 1907; § 7, ch. 102, 1909).

§ 8468. ACCEPTANCE OF DRAINAGE BY BOARD. After the work of construction shall have been fully completed and approved by the state engineer, the drainage may be accepted by the board of county commissioners, by order duly made, and payment shall be made therefor unless in the discretion of the board of county commissioners agreement be made for the partial payments; provided, that final payment shall not be made until the expiration of thirty days after the acceptance of the work and in case an appeal has been taken from the order accepting such work final payment shall not be made until the determination of such appeal; provided, further, that no payment shall be made to any engineer whose employment has not been approved by the state engineer, and no payment shall be made upon any contract for the construction of any such drainage project, unless the same shall have been constructed under the supervision of the state engineer; and provided further, that nothing in this section shall apply to minor drainage projects. All claims for compensation or expenses for publishing legal notices or supervising the construction of any such drainage project including the per diem and the mileage of the county commissioners, shall be paid from the general fund of the county, and for all such payments the county treasurer shall reimburse the general fund from the assessments herein provided for (§ 11, ch. 98, 1905; § 11, ch. 134, 1907; § 8, ch. 102, 1909; ch. 207, 1917).

§ 8469. APPEALS. An appeal shall lie for any final order or determination of the board of county com-

missioners establishing or denying any proposed drainage; fixing damages occasioned by the taking of lands for drainage or caused by such drainage; fixing the proportion of assessments of benefits; or accepting any drainage to the circuit court of the county in which such drainage is located by any one deeming himself aggrieved by any such order or determination. Written notice of such appeal shall be served upon the board of county commissioners and a bond conditioned to pay all the costs of such appeal, in case the contention of appellant be not sustained in some respect, shall be filed in the office of the clerk of courts, to be approved by him in such amount and with such sureties as he deems necessary. Upon the service of such notice and the filing of such bond, the county auditor shall transmit to the clerk of courts the petition and all other papers and records in the matter or certified copies thereof, when the convenience of the auditor's office would be seriously impaired by the transmission of the original records, and such matter shall be heard as an original action in the circuit court. No appeal shall operate as a stay of proceedings by the board of county commissioners, but the court may upon the taking of an appeal, for good cause shown issue an order staying the further proceedings by the board of county commissioners until the hearing and determination of such appeal. Before granting such stay, the court shall require an undertaking in sufficient amount and with sufficient surety to the effect that if the order appealed from be sustained the person upon whose motion the stay is granted shall pay all damages caused by the issuance of such order of stay. Any number of persons interested may join in the same appeal. Appeals shall be in all cases taken within thirty days from the making of the order or determination appealed from. If, on the trial of such action, it be determined that the drainage as petitioned for and established by order of the board is not conducive to the public health, convenience or welfare or is not necessary or practicable for the purpose of draining agricultural lands, the petitioners shall be jointly and severally liable for all the costs thus far incurred. If the contention of the appellant as to the amount of damages or proportion of benefits, the acceptance of the drain-

age, of the practicability of the drainage when the route thereof is varied by the county commissioners over the protest and objection of the petitioners, be sustained in whole or in part, the costs of such trial shall be part of the cost of the drainage. Upon an appeal from an assessment of benefits, the court of jury shall consider not only the relative benefits, to the tract in regard to which the appeal is taken, with reference to the tract taken as a unit, but shall also consider the question as to whether the tract taken as a unit is benefited or not; if benefited, to what extent. (§ 12, ch. 98, 1905; § 12, ch. 134, 1907; § 9, ch. 102, 1909).

§ 8470. ASSESSMENTS FOR MAINTENANCE. For the cleaning and maintenance of any drainage established under the provisions of this article, assessments may be made upon the landowners affected in the proportion determined for such drainage at any time upon the petition of any person setting forth the necessity thereof, and after due inspection by the board of county commissioners. Such assessments shall be made as other assessments for the construction of drainage, certificates may be issued thereon and assessments and certificates shall be liens, interest-bearing, perpetual and enforcible, in all respects as original assessments and may be sold at not less than par by the board of county commissioners, turned over to persons contracting for such cleaning and maintenance or may be collected directly by the board of county commissioners. (§ 13, ch. 98, 1905; § 13, ch. 134, 1907).

§ 8471. ASSESSMENTS PAID IN INSTALLMENTS. The owner of any tract of land against which an assessment for drainage is made, who shall, within thirty days after the making of such assessment, file with the county auditor an agreement in writing that in consideration of the right to pay his assessment in installments he will not make any objections to the illegality or irregularity of his assessment, if any there be, and will pay the same with interest as fixed by the board of county commissioners, shall have the privilege of paying such assessment in ten annual installments, interest payable annually. Assessment certificates shall not issue until after the expiration of the period of filing such agree-

ments with the county auditor, and when issued for assessments to be payable in installments may be issued in coupon form. The first installment shall be payable within ten days after a certified copy of the assessment has been filed, in the office of the county treasurer, and subsequent installments shall be payable one, two, three, four, five, six, seven, eight and nine years from the date of such assessment, respectively, with interest on the whole sum unpaid payable annually at maturity of the several installments. Such subsequent installments shall become delinquent after the expiration of thirty days from the time the same are payable and thereupon a penalty of five per cent shall attach thereto. Provided, that where bonds shall have been issued for the construction of such drainage, as provided in Section 8472, such assessments shall be made payable in installments sufficient to meet the payment on the bonds, as the same shall become due. Payments of assessments may at any time be received and full discharge thereof given by the county treasurer to any property holder, but after issue of bonds, such payment of assessments can be received only according to the terms of such bonds. (§ 14, ch. 98, 1905; § 14, ch. 134, 1907; § 10, ch. 102, 1909).

§ 8472. BOARD MAY ISSUE BONDS. The board of county commissioners, whenever it has ordered the establishment of any drainage, shall have authority by resolution to be spread upon its records, to provide for the issuance of bonds in such sums as may be necessary for the purpose of defraying the expenses incurred or to be incurred in obtaining the right of way or in locating or constructing any such drainage. Such word "expenses" shall be construed to mean and cover every item of cost of such drainage from its inception to its completion, such bonds to be payable only out of the funds to be derived from special assessments upon the lands benefited thereby. Such bonds shall bear interest at a rate not exceeding 7% per annum, payable annually and be payable not exceeding twenty years from issue. Such bonds shall be signed by the chairman of the board of county commissioners and countersigned by the auditor, who shall keep a record of all such bonds. Such bonds shall be issued for the benefit of the particular drainage,

numbered, recorded and indexed in the office of the county auditor, and shall in no case be issued for a sum exceeding the benefits to the lands affected by such drainage. The board of county commissioners shall have the power to negotiate such bonds at not less than par value, as it may deem best for the interest of all persons affected by such drainage, any premium received on such bonds to be credited to the fund of the particular drainage. Such bonds shall contain a recital that the same are issued pursuant to the authority of this article and that they are to be paid out of the funds to be obtained as herein provided. Assessments shall be made upon all of the lands benefited by such drainage for the payment of the principal and interest of such bonds when the same shall become due. Such assessments may be made by separate assessments for installments of interest and principal or in one proceeding with but one set of notices. When the assessments are finally fixed the same shall be certified to the county treasurer by the county auditor, and the money paid in thereon shall be received by the county treasurer and paid over to the holders of such bonds. Separate funds shall be kept by the treasurer for each drainage project, and no funds for one drainage project shall be applied to any other drainage. No county shall be liable for the payment of any bonds issued under this article, but such bonds shall be paid only out of the funds derived from the special assessments herein provided for. Such bonds may be made payable at such times as the board of county commissioners shall find for the best interests of the persons benefited by the drainage, and may be issued for all or any portion of the expenses of such drainage. (§ 15, ch. 98, 1905; § 15, ch. 134, 1907).

§ 8474. FURTHER POWERS OF BOARD. Where proceedings have been had for the establishment of a ditch, drain, levee, or straightening or enlarging of a natural watercourse under the law as heretofore existing, and the improvement has been established and constructed and assessments made upon the land benefited thereby, or upon any portion thereof, for the cost of such improvement, and where the assessment so made cannot for any reason be enforced, the board shall proceed as in all

lands benefited by such improvement in the same manner as if the appraisement and apportionment of benefits had never been made, and it shall proceed in the manner provided in this article, using as a basis the entire cost of such improvement, and in the assessment of such benefits account shall be taken of the amount of assessments, if any, that have been paid by those benefited and credit therefor shall be given accordingly. (§ 17, ch. 98, 1905; § 17, ch. 134, 1907).

§ 8475. DITCH OR DRAIN MAY BE DECLARED NUISANCE. Any ditch, drain or watercourse, which is now or may hereafter be constructed so as to prevent the sufrace and overflow water from adjacent lands from entering the same is hereby declared a nuisance and may be abated as such. (§ 18, ch. 98, 1905; § 18, ch. 134, 1907).

§ 8476. POWERS DEFINED. The powers conferred by this article for establishing and constructing drains shall also extend to and include the deepening and widening of any drains which have heretofore been or may hereafter be constructed, also to straightening, cleaning out and deepening the channels of creeks and streams and constructing, maintaining, remodeling and repairing levees, dykes and barriers for the purpose of drainage; and the board of county commissioners may relocate or extend the line of any drain if the same is necessary to provide a suitable outlet, and shall cause a survey thereof to be made, but no proceedings affecting the rights of persons or property shall be had under this section except upon notice and the other procedure prescribed herein for the construction of drains. (§ 19, ch. 98, 1905; § 19, ch. 134, 1907).

§ 8477. DRAINS UNDER CHARGE OF COUNTY COMMISSIONERS. All drains that have been constructed under any law of this state, or that may be constructed under the provisions of this article, shall, except as otherwise specifically provided, be under the charge of the board of county commissioners and be by it kept open and in repair. In all cases when any completed drain is or may be situated in more than one county, the care of the portion thereof lying within any county is assigned to the board of county commissioners of such county to be

kept open and in repair. The cost of such repairs shall in all cases be assessed, levied and collected in the same manner as provided in this article for the construction of drains originally and in all cases when no assessments of benefits shall have been made, the board of county commissioners having charge of such drain shall make such assessments. (§ 20, ch. 98, 1905; § 20, ch. 134, 1907).

§ 8478. BOARD MAY MAKE RULES AND REGULATIONS. The board of county commissioners may make such rules and regulations on the subject of drainage as it may deem proper, not inconsistent with the provisions of this article, and especially with regard to clearing out and keeping clear the channels of streams and the construction and maintenance of dams thereupon, with reference to their capacity for drainage. (§ 21, ch. 98, 1905; § 21, ch. 134, 1907).

§ 8482. DRAINS FOR TOWNS AND CITIES. The board of county commissioners shall have authority to establish drainage for or including the whole or any part of any city or incorporated town, including cities acting under special charter, as provided in this article, and it shall have the same authority with respect to the assessment of damages and benefits within such city or town as in other cases provided for in this article, and like notices to such city or town with respect to the establishment of such drainage and the apportionment and assessment of damages and benefits shall be given as is required by this article to be given to the owner of property damaged or benefited by the establishment or construction of such improvement. (§ 24, ch. 98, 1905; § 24, ch. 134, 1907).

§ 8485. COMPENSATION OF COUNTY COMMISSIONERS. The county commissioners shall receive for their services four dollars per day for the time actually spent by them in the performance of the duties of their offices under this chapter, publishers of newspapers shall receive for publishing legal notices the same fees as are allowed by law for publishing proceedings of the county commissioners; but the proceedings of the board of county commissioners when acting in any drainage matter under this article shall not be published as a part of its regular proceedings or at all. The county auditor shall charge a reasonable amount, to be fixed by the

board, for services, to be paid into the general fund of the county. Each county commissioner shall have power to administer any oath required in any drainage proceeding. (§ 27, ch. 98, 1905; § 27, ch. 134, 1907; § 11, ch. 102, 1909).

§ 8486. NOTICES, HOW SERVED. Notice by personal service, as of a summons in a civil action, may be given instead of by publication and posting in all cases where notice is provided for in this article. In any case where notice is required under the provisions of this article and any person affected by the drainage has not been notified, either by publication or personally, and a hearing has been had or determination made, such person may be notified personally or by publication and posting, to show cause at a time and place to be fixed by the board of county commissioners, and to make return or claim damages as in case of the original hearing. Any such omitted person may be brought in on such due notice at any stage of the proceeding, or after it has been otherwise concluded. The enforcement of any assessment shall not be enjoined for want of the notice provided for in this article, except pending an application to the board of county commissioners for the determination of such matters as to which any person deems himself not bound because of want of notice. (§ 28, ch. 134, 1907).

§ 8488. DEFECTS IN PROCEEDINGS DISREGARDED. Any defect or irregularity not affecting the substantial rights of parties interested, occurring in any drainage proceeding, shall be disregarded in any action seeking to avoid an assessment or cancel, annul or declare void any such proceeding. And in case the defect is substantial the court shall of its own motion determine the rights of the parties, validate the proceedings and assess the costs as justice may require, if the court shall find cause for such validation or such action should have been taken in the first instance and all parties interested are before the court. (§ 29, ch. 98, 1905; § 30, ch. 134, 1907).

§ 8489. INVALID OR ABANDONED PROCEEDINGS. If any proceeding for the location, establishment or construction of any drain under the provisions of a previous law has been heretofore enjoined, vacated, set aside, declared void, dismissed or voluntarily abandoned,

or if any such proceeding or like proceeding under this article be hereafter enjoined, vacated, set aside, declared void, dismissed or voluntarily abandoned in consequence of any error, defect, irregularity or want of jurisdiction affecting the validity of such proceeding or for any cause, the board of county commissioners may nevertheless proceed to locate a drain or drains under the same or different names and in the same or different locations from those described in he invalid or abandoned proceedings under the provisions of this article. In case any new proceeding be had resulting in the location of a drain in the same or substantially the same location as that described in the invalid or abandoned or dismissed proceeding, and the extent to which the same will contribute to the location, establishment or completion of such new drain. Such value shall be determined at a hearing upon the same notice as the equalization of benefits or assessments, and may at the same time or at any other time, and the notice of such hearing may be a part of the notice of the hearing upon the equalization of benefits or assessments or separate thereform, but the board shall in any case notify all persons interested to show cause why the determination of the board thereupon shall not be final. When finally fixed such value shall become a part of the cost of the new drainage. No use shall be made by the board of county commissioners in the laying out or completion of any drain or ditch under this article of any map, chart, survey, or other work done under any former law or under this article without having paid therefor; and all sums allowed for any work or material or money expended under the provisions of any previous law or under this article shall be paid to the persons who have paid therefor in proportion to the amounts severally paid by such persons. (§ 33, ch. 134, 1907).

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 453

A. G. RISTY, ET AL, AS COUNTY COMMISSIONERS ETC. ET AL, PETITIONERS,

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, RESPONDENT.

BRIEF FOR RESPONDENT ON PETITION FOR WRIT OF CERTIORARI

The Chicago, St. Paul, Minneapolis & Omaha Railway Company, plaintiff in the District Court and respondent in this Court, brought its bill in the District Court for the District of South Dakota against A. G. Risty and others, as County Commissioners of Minnehaha county, South Dakota, defendants, praying for an injunction restraining the making of an assessment upon the property of respondent for the cost of the construction of certain drainage works. The holders of warrants issued in payment of expenses incurred in the drainage project became interveners in the suit. A decree was entered in the District Court in favor of the plaintiff in that Court and respondent in this Court, (282 Fed. 364). From this decree the defendants and the interveners in the District Court appealed to the Circuit Court of Appeals for the Eighth Circuit in which Court the decree of the District Court was affirmed (297 Fed. 710). The defendants and interveners in the District Court, appellants in the Circuit Court of Appeals, have taken an appeal to this Court and have also, as petitioners, filed in this Court their petition for a writ of certiorari.

The main ground upon which petitioners ask that this Court grant a writ of certiorari is that a conflict has arisen between the decisions of the Circuit Court of Appeals for the Eighth Circuit and the decisions of the Supreme Court of the State of South Dakota in a matter relating to the construction of a statute of the state of South Dakota; and petitioners pray for the granting of a writ of certiorari upon the strength of *Forsyth vs Hammond*, 166 U. S. 506.

Our reply to the contention of petitioners is that no conflict exists between the decision of the Circuit Court of Appeals in this case and the decisions of the Supreme Court of South Dakota.

This case involves the construction of the drainage ditch statute of South Dakota. In the Circuit Court of Appeals this statute was attacked by respondent as unconstitutional. The Circuit Court of Appeals deemed it unnecessary to pass upon this contention but decided the case upon the ground that the proceedings, had under the statute in the instance of the particular drainage project under consideration, were irregular.

In *Gilseth vs Risty*, 46 S. D. 374, the Supreme Court of South Dakota rendered a decision in a case between other parties, but involving the same drainage project. The records in the two cases were entirely different and the Supreme Court of South Dakota held that the plaintiff in the case before it was estopped by his own laches from complaining of irregularities in the proceedings. There was in that case no conflict with the holding of the Circuit Court of Appeals in the present case.

In none of the other South Dakota cases cited by counsel for petitioners is there involved the drainage ditch project in controversy in the present case or any of the questions involved in the present case which were resolved by the Circuit Court of Appeals in favor of respondent.

For the foregoing reasons we submit that no showing is made whereby a writ of certiorari should be issued under *Forsyth vs Hammond*, 166 U. S. 506.

The remaining points raised by counsel for petitioners are, we believe, best answered by the opinion of JUDGE KENYON in the Circuit Court of Appeals. We, therefore, append a copy of this opinion to this brief as being the most apt reply which we can make to the contentions of counsel for petitioners.

Respectfully Submitted,

CHARLES O. BAILEY,
R. L. KENNEDY,
J. H. VOORHEES,
T. M. BAILEY,
Counsel for Respondent.

(297 FEDERAL REPORTER, 710)

A. G. RISTY, *et al*, as
County Commissioners, etc., *et al*,

vs.

CHICAGO, ROCK ISLAND & PACIFIC
RAILWAY COMPANY,
(*and five other cases*)

CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

MARCH 18, 1924

OPINION OF THE COURT

Appeal from the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Suits, by the Chicago, Rock Island & Pacific Railway Company, by the Chicago, Milwaukee & St. Paul Railway Company, by the Chicago, St. Paul, Minneapolis & Omaha Railway Company, by the Northern States Power Company, by the City of Sioux Falls, and by the Great Northern Railway Company, respectively, against A. G. Risty and others, as County Commissioners, and others. From decrees for plaintiffs (282 Fed. 364) the defendants in each case appeal. Affirmed.

In the year 1907 the board of county commissioners of Minnehaha county, S. D., acting under the drainage statutes of that state, established and had constructed a drainage ditch known as drainage ditch No. 1, bottom width of 40 feet, at an expense of $46,600. This ditch was north of Sioux Falls and ran first in a southerly direction from its initial point; thence easterly past the pumping station of the city of Sioux Falls; thence southeasterly about 1,000 feet to the Big Sioux river near the north limits of Sioux Falls. It passed through a ridge and descended approximately 100 feet in the terminal thousand feet. A spillway was constructed to carry the water down the descent. This ditch was approximately three miles in length, and there was a spur 670 feet long extending northwest into a bayou about 2,000 feet south of the initial point.

In 1910 the board of county commissioners established another drainage ditch known as drainage ditch No. 2, which extended north from the northern terminal of drainage ditch No. 1, for a distance of about 12 miles. This ditch likewise had a 40-foot bottom and was constructed at a cost of $81,106.19. These two ditches, making in fact one continuous ditch, drained certain agricultural lands, and traversed the land north of the city of Sioux Falls near the gravel bed from which the city obtained its water supply. It also passed near the state penitentiary lands and emptied into the Big Sioux river north of the falls in said river.

In the year 1916 there was a breaking of the river through the natural barrier into the bayou drained by the lateral branch. This, coupled with the large volume of water passing through these ditches, made it impossible for the spillway to carry the same, and it was washed out and destroyed. The waters therefore being uncontrolled descended from the steep bluff to the level of the Big Sioux river, and serious damage was threatened to various interests. There was danger that the Big Sioux river which flowed through the city of Sioux Falls would be diverted from its course and flow through these ditches cutting off the water supply of the city of Sioux Falls, injuring the Northern States Power Company, and depriving it of its water power.

The board of county commissioners attempted to devise some plan to reconstruct the spillway and to protect these various interests from the threatened damages.

April 8, 1916, certain parties filed a petition with the board of county commissioners asking that that portion of drainage ditch No. 1 containing the old spillway be closed and abandoned, and the course of said ditch extended in a southerly direction through Covell's Lake to the Big Sioux river; and said board did pass a resolution that said drainage ditch No. 1 be permanently closed above the present spillway or outlet thereof.

August 3, 1916, a petition of F. L. Blackman and other parties was filed entitled, "To Reconstruct and Improve Drainage Ditches Numbers One and Two in Minnehaha County, South Dakota, and to Construct a New Spillway or Outlet to said Drainage Ditches Numbers One and Two and to Pay Therefor by an Assessment upon the Property Persons and Corporations Benefited Thereby." This petition was transmitted by the board to the state engineer, and on August 14, 1916, a survey was ordered.

September 13, 1916, a report of the survey was made and filed by the engineer in charge. A resolution was thereupon adopted by the board fixing the line and width of said new proposed ditch in the exact location of old ditches No. 1 and No. 2, and providing for the time and place of hearing the petition. Notice was published for three successive weeks describing the route of the proposed drainage, and the tract of country likely to be affected thereby, in the general terms provided by the statute; also, the separate tracts of land through which the proposed ditch would pass, and the names of the owners of said tracts. Such notice informed all persons affected by the proposed drainage to appear at such hearing and show cause why the same should not be established. Upon the return date of the notice the commissioners adopted a resolution purporting to establish the so-called drainage ditch No. 1 and 2, and providing for the reconstruction of the spillway.

No appeal was taken from this order establishing the purported new project.

The commissioners then caused ditches No. 1 and No. 2 to be cleaned out, widened, deepened, and diked so as to increase the carrying capacity; caused the spillway to be reconstructed, and

certain portions of the Big Sioux river to be straightened. This work cost approximately $255,000, and drainage warrants were issued to be paid out of taxes assessed against the property determined to be benefited within the area of the purported new drainage ditch No. 1 and 2. The largest holders of these warrants are interveners in this action.

In April, 1919, notice was published of a hearing upon the matter of equalizing benefits resulting from said drainage ditch No. 1 and 2, and this was the first intimation that certain of appellees had that benefits might be assessed against them. The property of some of the appellees was not covered by the notice. However, the proceedings under this notice were abandoned.

June 10, 1921, appellant board by resolution fixed a proportion of benefits in units, which had been decided upon as a fair method of arriving at the same, on drainage ditch No. 1 and 2, and designated Monday August 1, 1921, at the office of the county auditor, as the time and place for hearing on the question of equalizing benefits, and caused notice of such hearing to be published as provided by the statute. Under the unit system adopted by the board upon recommendation of their engineer, the various appellees had units allotted against them as follows:

Chicago, Rock Island & Pacific Railway Company, out of a total of 32,569.62 units, 839.45.

Chicago, Milwaukee & St. Paul Railway Company, 1,681.

Chicago, St. Paul, Minneapolis & Omaha Railway Company, 839.45.

Northern States Power Company, 5,351.63.

Great Northern Railway, 613.85.

City of Sioux Falls, 3,147.95.

The amount due on warrants issued for this work at the time the actions were brought was about $300,000. The total units of benefit aggregate 32,549.62, so each unit of benefit amounts to slightly in excess of $9. If no changes had been made by the board, had they been permitted to proceed; the amounts charged against various appellees would have ranged from $50,000 against the Northern States Power Company to substantially $6,000 against the Great Northern Railway Company.

Appellees brought suit to restrain appellants from proceeding further with the equalization of said purported benefits and from levying any assessment upon their property to pay therefor. Some of the appellees had no property in original ditch district No. 1 and No. 2; others of appellees did have, and some difference is made in the contention of those not having property in the original ditch district and those who did have, but the issues in the main were the same as to all the parties.

All of the appellees contended in the trial court that the South Dakota drainage law was unconstitutional, violating the Fourteenth Amendment to the Constitution of the United States; that it also violated sections 2 and 3 of article 6 of the Constitution of the State of South Dakota. Some of the appellees contended

that the board exceeded its powers in what it attempted to do, in that the same was not for the drainage of agricultural lands, but being for other public purposes, could only be carried on by the corporate authority of drainage district entities established for that purpose, which had not been done, and that consequently the proceedings were void.

Others of the appellees contended that the proceeding seeking to establish drainage ditch No. 1 and 2 was a subterfuge to impose liability on new territory to pay for the maintenance of the former ditches, and that the proceedings were for maintenance and repair of the old drainage ditch and were not carried on as provided by section 8470 of the Code of South Dakota relating to assessments for the maintenance of drainage already established; that drainage ditch No. 1 and 2 was not a new ditch and not a new enterprise.

Further claim is made by the railroad appellees that the South Dakota drainage law is unconstitutional so far as respects assessments of railroad property, in that it provides for the giving of notice whatever of the apportionment and equalization of benefits to railroad companies.

All appellees claim that the attempted assessments upon their property are arbitrary, unjust and illegal, and constitute a discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law; and that the proceedings create a cloud upon their title.

It was the position of appellants, on the other hand, that the statutes referred to were constitutional; that the federal court in equity had no jurisdiction because there was a complete remedy at law; that there was no equitable question involved; no irreparable injury shown; no facts sufficiently pleaded to show any threatened cloud upon title; that the amount involved was not sufficient to give jurisdiction; that the bringing of the suit was premature; that ditch No. 1 and 2 was legally established as a new drainage project under the statute of South Dakota; and that the board of county commissioners had full jurisdiction to do each and every act which they performed.

The trial court held that section 8461 of the Reversed Statutes of South Dakota, being the statute particularly attacked as unconstitutional, gave sufficient notice and opportunity to be heard before an assessment became a lien against the property, and was constitutional. The court also held that the proceedings of the commissioners were proceedings for the maintenance of the original ditches No. 1 and No. 2; that there was no abandonment of the old ditches; that the formation of the new ditch was a pretense and subterfuge carried on for the purpose of compelling property outside of the original ditches No. 1 and No. 2 to share the burden of the repair and maintenance of these ditches, and held that the proceedings of the commissioners with relation to ditches No. 1 and No. 2, by attempting to constitute a new drainage district and calling it district No. 1 and 2, were void.

The court further found that the complaints presented a real and substantial question under the Constitution of the United States; that the amount involved was in excess of $3,000 exclusive of interest and costs, and that each complainant stated a case in his bill cognizable in equity in the federal court; and that there was no adequate remedy at law. Also found that diversity of citizenship existed as to all appellees, except as to the city of Sioux Falls; also, that the method of attempted assessment was discriminatory and arbitrary. The injunctions as prayed were granted.

N. B. Bartlett and E. O. Jones, both of Sioux Falls, S. D., for appellants.

A. B. Fairbank, of Sioux Falls, S. D. (Edward S. Stringer, Thomas D. O'Brien, and Alexander E. Horn, all of St. Paul, Minn., on the brief), for appellee Chicago, R. I. & P. Ry. Co.

C. O. Bailey, of Sioux Falls, S. D., and E. L. Grantham, of Aberdeen, S. D. (H. H. Field, of Chicago, Ill., and J. H. Voorhees, P. G. Honegger, T. M. Bailey, and C. O. Bailey, Jr., all of Sioux Falls, S. D., on the brief), for appellee Chicago, M. & St. P. Ry. Co.

C. O. Bailey, of Sioux Falls, S. D. (R. L. Kennedy, of St. Paul, Minn., and J. H. Voorhees, P. G. Honegger, T. M. Bailey, and C. O. Bailey, Jr., all of Sioux Falls, S. D., on the brief), for appellee Chicago, St. P., M. & O. Ry. Co.

Harold E. Judge, of Sioux Falls, S. D. (R. M. Campbell, of Chicago, Ill., on the brief), for appellee Northern States Power Co.

C. O. Bailey, of Sioux Falls, S. D. (Roy B. Marker, of Sioux Falls, S. D., on the brief), for appellee City of Sioux Falls.

Harold E. Judge, of Sioux Falls, S. D., for appellee Great Northern Ry. Co.

Before KENYON, Circuit Judge, and TRIEBER and DYER, District Judges.

KENYON, Circuit Judge (after stating the facts as above). It is earnestly contended by appellees that the entire South Dakota drainage law is unconstitutional, not only as violative of the due process clause of the Fourteenth Amendment of the Federal Constitution, but also sections 2 and 13 of article 6 of the South Dakota Constitution. The constitutional questions raised are grave, serious, and doubtful. Their determination is not necessary to the solution of these cases. Therefore, under the well-established rule that federal courts will not pass upon the constitutionality of statutes unless absolutely necessary, we leave the questions aside. Howat et al. v. State of Kansas, 258 U. S. 181, 42 Sup. Ct. 277, 66 L. Ed. 550; Weyman-Bruton Co. v. Ladd, 231 Fed. 898, 146 C. C. A. 94; Allen, U. S. Atty., v. Omaha Live Stock Commission Co. et al. (C. C. A.) 275 Fed. 1.

The original drainage ditches No. 1 and No. 2 were properly established for the drainage of agricultural lands. When the spillway washed out, the maintenance of the ditches was impaired. Not only that, but the situation was fraught with grave

consequence to many interests. The steep bluff was being torn away by the uncontrolled waters; the waterworks and water supply of the city of Sioux Falls, as well as the penitentiary lands of the state, were endangered. A not improbable result of the Big Sioux river breaking through the natural barrier into the lateral ditch would be the entire diversion of its waters from their natural channel causing them to flow through said ditches and empty into the river north of the city, leaving Sioux Falls with an intermittent dry river bed.

The board of county commissioners under these conditions took steps to remedy the situation, and upon petition filed stating its object in its caption as follows: "To Reconstruct and Improve Drainage Ditches Numbers One and Two in Minnehaha County, South Dakota, and to Construct a New Spillway or Outlet to Said Drainage Ditches Numbers One and Two and to Pay Therefor by an Assessment upon the Property, Persons and Corporations Benefited Thereby," proceeded to establish what is termed drainage ditch No. 1 and 2, Minnehaha county, S. D.

Appellees who have property within the area of the original drainage ditches, No. 1 and No. 2, insist that the proceedings established a new drainage ditch known as No. 1 and 2, which is also the position taken by appellants. Other appellees claim that the work was in truth and in fact a project for the repair of drainage ditches No. 1 and No. 2. The court held that the forming of the new ditch was a pretense and subterfuge resorted to for the purpose of attempting to burden appellees with the cost of maintenance of ditches theretofore constructed; that the commissioners did not act as by law provided for the maintenance and repair of the ditches; and that the proceedings attempting to establish the new drainage ditch were void. We think the court was correct in this holding. It clearly expressed the situation as follows:

"Under these circumstances the board of county commissioners had absolutely no authority, no right or color of right, were not acting under the provision of any statute of the state when they assumed the right to reach out and attempt to assess the benefits for the repair and maintenance of said ditches against the property of the various plaintiffs. They were mere trespassers, for the reason that no drainage ditch No. 1 and 2 was ever established and has no existence.

"I am of opinion that the proceedings of the board of commissioners in the repair and maintenance of these ditches, No. 1 and No. 2, by assuming the right to constitute a new drainage district, calling it district No. 1 and 2, and to assess benefits to the property of the plaintiffs, in so far as they are located in the city of Sioux Falls, are void. Entertaining this view, it follows that plaintiff's prayer for an injunction should be granted."

Record, p. 90, Case No. 6313.

The proceedings, regardless of how designated, were in fact for repair and maintenance, and were governed as to assessments to pay for the same by section 8470 of the South Dakota Statutes, which section is as follows:

"*Assessments for Maintenance.*—For the cleaning and maintenance of any drainage established under the provisions of this article, assessments may be made upon the landowners affected in the proportions determined for such drainage at any time upon the petition of any person setting forth the necessity thereof, and after due inspection by the board of county commissioners. Such assessments shall be made as other assessments for the construction of drainage, certificates may be issued thereon and such assessments and certificates shall be liens, interest-bearing, perpetual and enforceable, in all respects as original assessments and may be sold at not less than par by the board of county commissioners, turned over to persons contracting for such cleaning and maintenance, or may be collected directly by the board of county commissioners." Section 13, c. 98, 1905; section 13, c. 134, 1907.

There is no provision in this statute for the taking in of other lands to help bear the assessment of burdens created in maintaining the original drainage. This was the statute under which the board of county commissioners could have provided for payment of maintenance and repairs to the established ditches.

Section 8489 provides for a method of abandonment of drains under certain circumstances and the construction of new ones in the same location. Said statute is as follows:

"*Invalid or Abandoned Proceedings.*—If any proceeding for the location, establishment or construction of any drain under the provisions of a previous law has been heretofore enjoined, vacated, set aside, declared void, dismissed or voluntarily abandoned, or if any such proceeding or like proceeding under this article be hereafter enjoined, vacated, set aside, declared void, dismissed or voluntarily abandoned in consequence of any error, defect, irregularity or want of jurisdiction affecting the validity of such proceeding or for any cause, the board of county commissioners may nevertheless proceed to locate a drain or drains under the same or different names and in the same or different locations from those described in the invalid or abandoned proceedings under the provisions of this article. In case any new proceeding be had resulting in the location of a drain in the same or substantially the same location as that described in the invalid or abandoned proceeding, the board of county commissioners shall proceed to ascertain the real value of the services rendered, money expended and work done under such invalid, abandoned or dismissed proceeding, and the extent to which the same will contribute to the location, establishment or completion of such new drain. Such value shall be determined at a hearing upon the same notice as the equalization of benefits or assessments, and may be at the same time or at any other time, and the notice of such hearing may be a part of the notice of the hearing upon the equalization of benefits or assessments or separate therefrom, but the board shall in any case notify all persons interested to show cause why the determination of the board thereupon shall not be final. When finally fixed such value shall become a part

of the cost of the new drainage. No use shall be made by any board of county commissioners in the laying out or completion of any drain or ditch under this article of any map, chart, survey, or other work done under any former law or under this article without having paid therefor; and all sums allowed for any work or material or money expended under the provisions of any previous law or under this article shall be paid to the persons who have paid therefor in proportion to the amounts severally paid by such persons." Section 33, c. 134, 1907.

The proceedings establishing drainage ditches No. 1 and No. 2 have never been set aside or abandoned under this statute. It is true a small portion of old ditch No. 1 was abandoned by the resolution adopted in the Covell's Lake proceeding, but the ditches were in no way abandoned. The Covell's Lake proceeding was itself abandoned and the ditches were left as they originally were, so it is apparent that the action of the board was not taken under section 8489. Either the proceedings were to repair and maintain ditches already constructed, or they were to take care of a situation resulting from their imperfect or inadequate construction. By reason of the water of the river breaking through into the lateral threatening a change of the river's course and the possible destruction of state lands, a situation was presented, not with relation to the drainage of agricultural lands, but rather to the failure of the ditches, due to inadequate or imperfect construction, to carry the increased flow of water. In other words, the project, if an entirely new one, was not for the drainage of agricultural lands. The court said in his opinion:

"Pursuant to this provision of the Constitution, the Legislature of the state has provided for the drainage of agricultural lands; but nowhere is there any statutory enactment under which drainage districts may be formed for the drainage of lands 'for any public use.' "

We are satisfied that under the South Dakota Constitution, section 6, art. 21, drainage of lands for any public use other than the drainage of agricultural lands, must be carried out by drainage districts, and no legislation at the time of these proceedings had been provided for the establishment of such drainage districts. Whichever way, therefore, the matter is viewed, the board was acting without legal authority in its apportionment of benefits and threatened assessment of taxes.

Appellants challenge the jurisdiction of the court, claiming there was a plain, adequate, and complete remedy at law; that there was no equity in the bill; that action was premature, and that the necessary jurisdictional amount was not involved. These in their order.

It is fundamental that equity cannot give relief where there is a plain, adequate, and complete remedy at law. It is provided by the federal Judicial Code, Compiled Stat. 1918, § 1244, as follows:

"*Suits in Equity.*—Suits in equity shall not be sustained in any court of the United States in any case where a plain, ade-

quate, and complete remedy may be had at law. (R. S. § 723. March 3, 1911, c. 231, § 267, 36 Stat. 1163.)"

It must be a remedy as certain, complete, prompt, and efficient to attain the ends of justice as that in equity. Monmouth Inv. Co. et al. v. Means, 151 Fed. 159, 80 C. C. A. 527; McMullen Lumber Co. v. Strother et al., 136 Fed. 295, 69 C. C. A. 433; Morgan v. Beloit, City and Town, 74 U. S. (7 Wall.) 613, 19 L. Ed. 203; McConihay v. Wright, 121 U. S. 201, 7 Sup. Ct. 940, 30 L. Ed. 932; Tyler v. Savage, 143 U. S. 79, 12 Sup. Ct. 340, 36 L. Ed. 82; Boise Artesian Hot & Cold Water Co. v. Boise City, 213 U. S. 276, 29 Sup. Ct. 426, 53 L. Ed. 796; Greene, Auditor, et al., etc., v. Louisville & Interurban Railroad Co., 244 U. S. 499, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88; Coler et al. v. Board of Com'rs of Stanly County et al. (C. C.) 89 Fed. 257.

It must be a remedy on the law side of the federal court. A remedy in the state court that cannot be pursued in the federal court is not an adequate remedy. Sheffield Furnace Co. v. Witherow, 149 U. S. 574, 13 Sup. Ct. 936, 37 L. Ed. 853; Smyth v. Ames, 169 U. S. 466, 516, 18 Sup. Ct. 418, 42 L. Ed. 819; United States Life Ins. Co. in City of New York v. Cable, 98 Fed. 761, 39 C. C. A. 264; Brun et al. v. Mann, 151 Fed. 145, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154.

The question is: Has party the adequate remedy at law in the federal court?

In Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 391, 14 Sup. Ct. 1047, 1052 (38 L. Ed. 1014), the court said:

"Nor can it be said in such a case that relief is obtainable only in the courts of the state. For it may be laid down as a general proposition that, whenever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the state to protect property rights, a citizen of another state may invoke the jurisdiction of the federal courts."

It has been held that where the state statute provided an action at law against the county for the recovery of sums paid on account of invalid taxes that the same constitutes a plain, speedy, and adequate remedy at law. Union Pac. R. Co. v. Board of Com'rs of Weld County, Colo., 217 Fed. 540, 133 C. C. A. 392. The Supreme Court of the United States has held that the North Dakota statute permitting actions respecting title of the property or accruing on contract to be brought against the state the same as against a private person does not clearly allow an adequate remedy; and there, injunction restraining defendants from taking steps to enjoin certain taxes, was upheld. Wallace et al. v. Hines, Director General of Railroads, et al., 253 U. S. 66, 40 Sup. Ct. 435, 64 L. Ed. 782. There was no such proceeding as discuss-

ed in Union Pac. R. Co. v. Board of Com'rs of Weld County, Colo., supra, in the South Dakota statutes. The only remedy was to appear before the board of county commissioners (claimed by appellees to be acting without authority), and then appeal from their finding to the state court. Such was not the adequate remedy contemplated by the federal statute.

While the frequent exercise of equity jurisdiction is in staying the collection of taxes illegal in whole or in part, a suit in equity will not lie to restrain the assessment or collection of a tax on the sole ground that it is illegal. There must be special circumstances bringing the case under some recognized head of equity jurisdiction. The right to such equitable relief must be clear where it is asked to restrain the collection of a state tax.

In Hannewinkle v. Georgetown, 15 Wall. 547, 548 (21 L. Ed. 231), it is said:

"It has been the settled law of the country for a great many years, that an injunction bill to restrain the collection of a tax, on the sole ground of the illegality of the tax, cannot be maintained. There must be an allegation of fraud; that it creates a cloud upon the title; that there is apprehension of multiplicity of suits, or some cause presenting a case of equity jurisdiction."

In Union Pacific Railway Co. v. Cheyenne, 113 U. S. 516, 525, 526, 5 Sup. Ct. 601, 605 (28 L. Ed. 1098), the rule is clearly laid down by the court:

"It cannot be denied that bills in equity to restrain the collection of taxes illegally imposed have frequently been sustained. But it is well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax; for it must be presumed that the law furnishes a remedy for illegal taxation. It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage, or be subject to vexatious litigation, if he were compelled to resort to his legal remedy alone. For example, if the legal remedy consisted only of an action to recover back the money after it had been collected by distress and sale of the tax-payer's lands, the loss of his freehold by means of a tax sale would be a mischief hard to be remedied. Even the cloud cast upon his title by a tax under which such a sale could be made, would be a grievance which would entitle him to go into a court of equity for relief. Judge Cooley fairly sums up the law on this subject as follows: 'To entitle a party to relief in equity against an illegal tax, he must by his bill bring his case under some acknowledged head of equity jurisdiction. The illegality of the tax alone, or the threat to sell property for its satisfaction, cannot, of themselves, furnish any grounds for equitable interposition. In ordinary cases a party must find his remedy in the courts of law and it is not to be supposed he will fail to find one adequate to his proper relief. Cases of fraud, accident or mistake, cases of cloud upon the title to one's property, and cases where one is threatened with irremediable mischief, may demand other remedies than those the common law can give, and these in proper cases, may be afforded

in courts of equity.' This statement is in general accordance with the decisions of this court as well as of many state courts."

See, also, Dows v. City of Chicago, 78 U. S. (11 Wall.) 108, 20 L. Ed. 65; State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663; Ogden City v. Armstrong, 168 U. S. 224, 18 Sup. Ct. 98, 42 L. Ed. 444; Pittsburgh, etc., Railway v. Board of Public Works of W. Va., 172 U. S. 32, 19 Sup. Ct. 90, 43 L. Ed. 354; Singer Sewing Mach. Co. v. Benedict, 229 U. S. 481, 33 Sup. Ct. 942, 57 L. Ed. 1288; Ohio Tax Cases, 232 U. S. 576, 34 Sup. Ct. 372, 58 L. Ed. 737.

In Keokuk & Hamilton Bridge Co. v. Salm et al., 258 U. S. 122, 42 Sup. Ct. 207, 66 L. Ed. 496, the alleged invalidity consisted in discriminatory overvaluation. There was no claim of absolute illegality in the assessment. Appellant had a remedy with the board of review to correct the assessment, and the court said that resort to the suit to prevent either a sale for an illegal tax creating a cloud upon title or other irreparable injury had no basis.

In Union Pacific R. Co. v. Board of Com'rs of Weld County, 217 Fed. 540, 133 C. C. A. 392, this court said with reference to the casting of a cloud upon real property creating an "equitable circumstance" that the remedy which the statute prescribes will dissipate any such cloud, and says:

"Those cases which hold that a cloud upon the title to real property affords a ground for equitable relief are not applicable, when the taxpayer is given the remedy of paying his taxes and recovering back any sum which the courts shall hold to have been illegally exacted."

There is no such provision in the South Dakota statute.

In Boise Artesian Hot & Cold Water Co. v. Boise City, 213 U. S. 276, 29 Sup. Ct. 426, 53 L. Ed. 796, it was held that equity should not enjoin the collection of a tax on the ground of cloud on title when the tax can only be collected in suit at law in which the defense of its illegality is open, and further it not appearing that the tax is a lien on any of complaint's property.

In Indiana Manufacturing Co. v. Koehne, 188 U. S. 681, 23 Sup. Ct. 452, 47 L. Ed. 651, certain assessments upon shares of stock in a corporation were involved. The court found that as there was no lien created on real estate there was no cloud on title.

It is well settled that an assessment that will put a cloud on titles gives rise to equitable jurisdiction unless there is an adequate remedy at law. Union Pacific Railway Co. v. Cheyenne, 113 U. S. 516, 5 Sup. Ct. 601, 28 L. Ed. 1098; Green, Auditor, et al., etc., v. Louisville & Interurban Railroad Co., 244 U. S. 499, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88.

Section 8463 of the South Dakota Statutes provides for the board of county commissioners fixing the proportion of benefits of proposed drainage among the lands affected.

Section 8464 provides for the board making an assessment against each tract and property affected, and this is collectible

by the treasurer's office. Clearly the assessment would create a cloud upon the title. Fixing the proportion of benefits being preliminary to the assessment and a part of the machinery of assessment, likewise, we think, creates a cloud upon the title and gives equity jurisdiction. Shelton v. Platt, 139 U. S. 591, 11 Sup. Ct. 646, 35 L. Ed. 273; Ohio Tax Cases, 232 U. S. 576, 34 Sup. Ct. 372, 58 L. Ed. 737; Hopkins et al. v. Walker et al., 244 U. S. 486, 37 Sup. Ct. 711, 61 L. Ed. 1270.

Was the case prematurely brought? It is claimed that inasmuch as the board of county commissioners had not assessed the taxes complained of consequently the suit is premature.

In Western Union Telegraph Co. v. Howe et al., 180 Fed. 44, 103 C. C. A. 398, it was held by this court that the suit was prematurely brought because the telegraph company did not pursue the remedy afforded by law to have its assessment corrected by the state board of equalization. That was not a case, however, where it was claimed that the entire proceedings were without authority and illegal, as is the case here. The jurisdiction to act was not questioned.

In Keokuk & Hamilton Bridge Co. v. Salm et al., 258 U. S. 122, 42 Sup. Ct. 207, 66 L. Ed. 496, the question involved was the amount of the tax. It was not claimed that the proceedings were illegal.

In the late case of Milheim et al. v. Moffat Tunnel Improvement District et al., 262 U. S. 710, 43 Sup. Ct. 694, 67 L. Ed. 1194, there was no question of jurisdiction of the taxing body as there is here. Plaintiff's property was by legislative act placed within the taxing district.

The proceeding here involved, being without authority, the situation is quite different from where the only question involved is the inequality of taxes levied by a board having jurisdiction to act. The actions, we are satisfied, were not premature.

Appellants urgently insist that it does not appear from the record that the amount in controversy, exclusive of interest or costs, exceeds the sum or value of $3,000, and that the statements in the various complaints of appellees so alleging are false, and stated with the fraudulent purpose of imposing upon the jurisdiction of the federal court; that no tax has in fact been assessed; that the apportionment of benefits is tentative and subject to correction; and that there is no way of determining what the amount of the assessment against the respective appellees would have been had the proceedings not been interrupted by the injunctions; and that there is in fact no sum whatsoever in controversy between the parties hereto.

It has been held that future, undetermined, unaccrued, or unspecified taxes cannot be taken into consideration to give jurisdiction; that the court cannot engage in speculation as to such taxes. Holt v. Indiana Manufacturing Co., 176 U. S. 68, 20 Sup. Ct. 272, 44 L. Ed. 374; New England Mortgage Security Co. v. Gay, 145 U. S. 123, 12 Sup. Ct. 815, 36 L. Ed. 646; Citizens' Bank

v. Cannon, 164 U. S. 319, 17 Sup. Ct. 89, 41 L. Ed. 451; Washington & Georgetown R. R. Co. v. District of Columbia, 146 U. S. 227, 13 Sup. Ct. 64, 36 L. Ed. 951. Also, that where there is a suit to enjoin collection of a tax the amount of the tax is the test of jurisdiction. Linehan Ry. Transfer Co. v. Pendergrass, 70 Fed. 1, 16 C. C. A. 585; Eachus v. Hartwell et al. (C. C.) 112 Fed. 564; Washington & Georgetown R. R. Co. v. District of Columbia, 146 U. S. 227, 13 Sup. Ct. 64, 36 L. Ed. 951; Board of Trustees of Whitman College v. Berryman et al. (C. C.) 156 Fed. 112; Citizen's Bank v. Cannon, 164 U. S. 319, 17 Sup. Ct. 89, 41 L. Ed. 451; City of Ottumwa, Iowa, v. City Water Supply Co., 119 Fed. 315, 56 C. C. A. 219, 59 L. R. A. 604.

It has also been held that where the complaint alleges the amount in controversy to equal the jurisdictional requirement and the contrary does not appear to a certainty from the evidence, that the jurisdiction will be sustained. Maffet v. Quine (C. C.) 95 Fed. 199; Von Schroeder v. Brittan (C. C.) 93 Fed. 9.

What is the situation here? Each one of the appellees is threatened with an assessment of more than $3,000. The Northern States Power Company is threatened with one of $50,000. And further, certain appellees who have no property within the original drainage districts No. 1 and No. 2 are brought into the district and made liable to further assessments for maintenance and repair of ditches. It appears from the record that the board of county commissioners had fixed against the different appellees the proportion of benefits on a unit basis. It is without question that the county commissioners have issued approximately $255,000 worth of warrants for this work, and that the amount due thereon is about $300,000. It is a matter then of mere mathematical calculation to arrive at the threatened assessment against each one of appellees.

Exhibit C is the notice to the various parties against whom proportions of benefits have been fixed. It provides as follows, to wit:

"All such owners and all persons interested are hereby notified and summoned to show cause at the time and place aforesaid why the proportion of benefits shall not be fixed as stated, and the said determination of said board made final."

If no action whatever were taken by appellees the amounts would be final, and under these circumstances we believe the amount in dispute in each case exceeds the jurisdictional requirement. The claim of amount is evidently made in good faith, and not for the mere purpose of giving the federal courts jurisdiction. We do not believe that where the board has passed a resolution fixing benefits which exceed the jurisdictional amount and are the basis of a proposed assessment, and which parties claim are fixed by the board without authority, that because said board may equalize the benefits or even find that no benefits exists the parties must wait until the final action of the board. It is suggested that the board may so equalize benefits that the jurisdictional amount will not be involved, but as the matter

stood when the case was brought each appellee was threatened with the levying of a tax for more than the jurisdictional amount, and some of the necessary steps had already been taken.

As the proportion of benefits had been fixed subject to change by the board only if appellees should convince them that their conclusion was erroneous, and in view of the claim in apparent good faith in each of the bills that the amount involved exceeded the jurisdictional amount, we hold, from a careful survey of the entire record, that the necessary amount existed in each case to give jurisdiction to the federal court.

All bills of complaint raise questions under the federal Constitution that are substantial and not merely colorable. Hence the court has jurisdiction exclusive of diversity of citizenship, which existed as to all appellees except the city of Sioux Falls, necessary amount being involved, to determine all questions in the record, and it has not lost jurisdiction by omitting to decide the constitutional ones. Silver et al., etc., v. Louisville & Nashville R. R. Co., 213 U. S. 175, 29 Sup. Ct. 451, 53 L. Ed. 753; Ohio Tax Cases, 232 U. S. 576, 34 Sup. Ct. 372, 58 L. Ed. 737; Louis. & Nash. R. R. Co. v. Finn, 235 U. S. 601, 35 Sup. Ct. 146, 59 L. Ed. 379; Greene, Auditor, et al., etc., v. Louis. & Interurban R. R. Co., 244 U. S. 499, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88.

Appellants plead estoppel against all of the appellees, and claim that appellees are not in position to maintain their actions, for the reason that as to some of the railroad companies the engineering departments have been in close touch with the drainage ditch proceedings; that some of them were assessed for benefits received upon the construction of the original drainage ditches in the same territory, received benefit thereby, and have not protested before the bringing of this action. As to some of the appellees it is claimed that their officers showed interest in the construction work and encouraged the board of commissioners to do the work; that some of the appellees, for instance, the Chicago, Milwaukee & St. Paul Railway Company, hauled men and materials used in the construction work, and stopped trains between stations to unload men and materials. As to the city of Sioux Falls, it is claimed by way of estoppel that under due authority the mayor and city auditor signed the petition for the project. There can certainly be no just claim of estoppel as to those appellees whose property was not within the area of the original drainage ditches No. 1 and No. 2. As to the other appellees, the decree related only to the property outside of the original assessment areas of drainage ditches No. 1 and No. 2. So we are to consider the situation as bearing on the question of estoppel only as to the property outside of the original assessment areas up to the time of the notice of the fixing of benefits. The various appellees as to such property had no notice, when the acts constituting the alleged estoppel took place, that the same was to be affected by the drainage construction or would be assessed for the cost thereof. Hence the claimed acts of agents and officers of appellees would not constitute estoppel. The situation

is quite different from that presented in Gilseth v. Risty (S. D.) 193 N. W. 132—at least as to all appellees except the city of Sioux Falls. We do not pass on the question of estoppel as to any appellees, as to assessments that may be made on their property within the original area of ditch No. 1 and ditch No. 2, for the purpose of maintaining such ditches.

Other questions are presented which we think are not involved in the determination of these cases.

The decree of the trial court in each case is affirmed.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 454.

A. G. RISTY, ET AL., AS COUNTY COMMISSIONERS, ETC., ET AL., PETITIONERS,

vs.

NORTHERN STATES POWER COMPANY, RESPONDENT

STATEMENT AND BRIEF IN RESISTANCE OF PETITION FOR CERTIORARI

Believing that if the court is fully and correctly informed with reference to the questions involved in this case it will not deem such questions of sufficient importance or of such nature as to induce it to exercise its power in certiorari, we respectfully ask consideration of the following in resistance of the petition for certiorari filed herein.

STATEMENT OF CASE

The Big Sioux River flows from the north in a southerly direction west of the city of Sioux Falls to a point southwest of the city, thence easterly and thence northerly through the city to a point where it is intersected by the outlet of the drainage ditch or ditches in controversy.

Respondent owns and operates an hydro-electric plant in the city of Sioux Falls operated partly by water power from the falls of the Big Sioux River and partly by steam power. All of its real property is of granite rock formation, the rock appearing at the surface of the ground without soil

thereon, and no part of such property is or ever can be suitable for agricultural purposes.

In or about the years 1907 to 1909, petitioners, county commissioners (hereinafter referred to as "The commissioners") caused to be constructed what was then known as Drainage Ditch No. 1, having its origin at a point about three and one-half to four miles north of the city of Sioux Falls, and emptying into the Big Sioux River at a point north of and below respondent's hydro-electric plant.

While the proceedings for the construction of Drainage Ditch No. 1 were pending a petition was filed for the construction of what was first known as Ditch No. 2. Subsequently another petition was filed, seeking the extension of proposed Ditch No. 2, and praying that it be made a part of Ditch No. 1. The commissioners finally, by resolution, established and caused to be constructed Drainage Ditch No. 2, having its origin at a point approximately fifteen miles north of the outlet of Ditch No. 1 on the east side of the Big Sioux River, and running thence in a southerly direction, intersecting the Big Sioux River at one point, and so close to the river at other points that the river subsequently cut into the ditch, and connecting with and emptying into Ditch No. 1 at its point of origin.

The commissioners, by resolution, determined that all of the property theretofore included within what they had determined to be the area of Drainage Ditch No. 1 was also benefited by Drainage Ditch No. 2; that the two ditches were mutually interdependent and should virtually be considered as one drainage system, and they assessed all of said property for the construction of both ditches. The system of drainage thus established was completed and paid for by assessment upon the property then deemed to be benefited which did not include any property lying south of the outlet of Ditch No. 1. No part of respondent's property was included within the drainage area thus established; it was given no notice of of any kind of the establishment of such drainage and no attempt was made to include its property within the drainage area or assess it for any part of the cost of the drainage.

As originally constructed, and after the connection of Drainage Ditches No. 1 and 2, the outlet of Drainage Ditch No. 1 consisted merely of a concrete apron hereinafter referred to as "spillway," extending from the lower terminus of Drainage Ditch No. 1 down over an abrupt slope to the Big Sioux River at a point below the falls of the river and as heretofore stated north of and below respondent's hydro-electric plant. In the year 1916, the volume of water passing through Ditches No. 1 and No. 2 washed out a portion of this concrete work with the result that the waters in the spillway were at that point uncontrolled and serious damage was threatened by the continued maintenance of the ditches in the absence of properly constructed works for the purpose of controll-

ing and confining the waters at their outlet. It is conceded that with the ditches in the condition in which they were after the washing out of the spillway there was great danger that the Big Sioux River would be diverted from its course around the city of Sioux Falls and caused to flow through the ditches from the point of intersection some miles north of the city returning to the river at the point where the old spillway was located below the falls and below respondent's plant, thus threatening to seriously damage its property, the water supply of the city of Sioux Falls, and many other properties and rights, and in fact, threatening to deprive respondent entirely of its water power.

It appears from the answer and the undisputed evidence that the commissioners started work of some character to attempt to control the waters at the spillway and to prevent the threatened damage; that certain property owners within the area theretofore determined to be benefited by the drainage objected to this work and instituted suit in the state court to restrain the same; that thereafter a petition was filed with petitioners seeking a change of the outlet of the Drainage Ditches No. 1 and No. 2 in such manner as to discharge the water from said ditches into what is known as Covell's Lake, situated in the northwesterly part of the city of Sioux Falls; that thereafter the owners of property within the drainage area as theretofore determined and the parties interested in the Covell's Lake project had numerous conferences with reference to the matter;, that as a result of such conferences and as a compromise between said parties (there being no contention or proof that respondent was a party thereto) the proceedings had under the petition last referred to were abandoned and a petition known as the petition of F. L. Blackman and others was filed, which petition is entitled "Petition to Reconstruct and improve Drainage Ditches No. 1 and No. 2 in Minnehaha County, South Dakota, and to construct a new spillway or outlet to said Drainage Ditches No. 1 and No. 2 and to pay therefor by an assessment upon the property, persons and corporations benefited thereby." Upon this petition, confessedly filed and acted upon by petitioners as a compromise between the owners of property within the drainage area and the promoters of the so-called Covell's Lake project, and not including respondent, the commissioners adopted a resolution providing for its hearing and caused notice of said hearing to be published. Respondent was not named in said notice; its hydroelectric plant and water rights were not referred to, and no part of its property was described. It contained nothing which could be construed as giving any notice whatever to it that any claim would be made of benefit to its property or that any attempt would be made to assess its property in such proceeding.

Upon the return day of such notice, the commissioners adopted a resolution purporting to re-establish Drainage

Ditches No. 1 and No. 2 under the name of Drainage Ditch No. 1 and 2, *along the exact course of their previous construction* and for the re-construction of the outlet or spillway.

Purporting to act under this resolution, the commissioners caused Ditches No. 1 and No. 2 to be cleaned and otherwise repaired and caused the outlet or spillway thereof to be re-constructed, and pursuant to a resolution or resolutions thereafter adopted, without any notice to respondent, caused certain portions of the Big Sioux River to be straightened. The spillway was re-constructed under the cost plus plan without advertising for bids for its re-construction in accordance with the plans finally adopted, and warrants were issued for the cost of such work amounting, with interest, to approximately $300,000.00.

The first intimation contained in the record of any thought of assessment of or attempt to assess any part of respondent's property appears in a notice published in April, 1919, said notice being of a hearing upon the matter of equalization of benefits resulting from said Drainage Ditch No. 1 and 2 and in which certain tracts of real property owned by respondent were described and attempted to be apportioned benefits to the extent of a very few units. The commissioners did not at that time, however, attempt to assess the hydro-electric plant or water rights of respondent and such plant and rights were not referred to in the April, 1919, notice. Proceedings under this notice were abandoned.

Subsequently and in or about the month of July, 1921, the commissioners adopted a resolution apportioning the benefits derived from said Drainage Ditch No. 1 and 2 and apportioned to respondent and to its hydro-electric plant, dam, property rights and water rights benefits to the extent of 5,351.63 units, amounting, as will appear from a mathematical calculation, to approximately $50,000.00. This suit was instituted for the purpose of restraining the commissioners from proceeding further with the equalization of said purported benefits and from spreading an assessment upon respondent's property therefor.

The district court acquired jurisdiction both by virtue of well pleaded federal questions and because of diversity of citizenship.

Respondent predicated its claim that the entire proceedings of the commissioners were void upon the following contentions:

1. That the South Dakota drainage ditch statutes were violative of the Fourteenth Amendment to the Federal Constitution;

2. That the acts of the commissioners were so arbitrary and discriminatory as to deprive it of the equal protection of

the laws, and that such acts were, therefore, in violation of the Federal Constitution;

3. That the acts of the commissioners in attempting to increase the drainage area of Drainage Ditches No. 1 and No. 2, and to assess respondent's property, not included in such area as originally established, were void because not done pursuant to or authorized by any statutes of the state of South Dakota;

4. That the proceedings of the commissioners in attempting to create a new drainage proposition and a new drainage area were a mere subterfuge resorted to by them pursuant to agreement between them and the owners of property in the original drainage area for the purpose of enabling them to assess respondent's property for the cost of such repair and maintenance of the original ditches as was necessary in order to enable them to function without damage to or destruction of the property and rights of respondent and others.

The district court decided that the South Dakota drainage statutes were not violative of the Fourteenth Amendment to the Federal Constitution, but found, in substance, as follows:

1. That the forming of the so-called new ditch was simply a pretense and subterfuge resorted to by the commissioners for the sole purpose of attempting to burden respondent and others with the cost of the maintenance of the ditches theretofore constructed;

2. That the South Dakota statutes did not authorize the assessment of property not included within the drainage area of the ditches in question, as originally determined, for the maintenance of such ditches after they had been constructed and the benefits therefor had been assessed, and that the proceedings of the commissioners in so far as they purported to affect the property and rights of respondent were, therefore, void;

3. That the statutes of the state of South Dakota in so far as they purport to authorize drainage proceedings for any purpose other than the drainage of agricultural lands were in conflict with the constitutional provision of the state of South Dakota requiring the corporate organization of drainage districts as a condition precedent to drainage proceedings for any such other purpose, and further found that the proceedings in question, if treated as new proceedings resulting in the establishment of a new ditch, were void because the work done pursuant to such proceedings was not done for the purpose of draining agricultural lands, and that such proceedings were, therefore, not authorized by the state statutes or Constitution; and

4. That regardless of whether or not the alleged new drainage district had been legally constituted, respondent was entitled to the relief asked because of the arbitrary and dis-

criminatory acts of petitioners, bringing respondent within the rule expressed in the case of *Thomas, et al. v. Kansas City Southern R. R. Co.*, 261 U. S. 481, 67 L. ed. 758.

C. R. I. & P. Ry. Co. v. Risty et al. 282 Fed. 364.

The Circuit Court of Appeals did not pass upon the Federal constitutional questions involved because, although finding them "grave, serious and doubtful," it deemed their determination not necessary "to the solution of the case," but in other respects it approved the decision of the district court, and affirmed the decree restraining assessment of respondent's property lying outside the drainage area as originally established.

Risty et al. v. C. R. I. & P. Ry. Co. 297 Fed. 710.

BRIEF

We believe the foregoing statement, which in all respects is sustained by the record, is all that is necessary to present to the court in support of our suggestion that the importance and nature of the questions involved are not such as to demand the exercise of its power in certiorari. We desire, however, to briefly consider the proposition, apparently chiefly relied upon by petitioners, that the decision of the Circuit Court of Appeals has created a conflict between itself and the decisions of the Supreme Court of the State of South Dakota.

We assume that this court will not find that such conflict exists as to demand the exercise by it of the extraordinary power under consideration unless it clearly and conclusively appears: first, that the nature of the questions involved in this case is such that the decisions of the highest court of this state with reference to them will be regarded as authoritative by this court, and second, that such questions have been so decided by the state court as necessarily to foreclose respondent of such rights and remedies as the Federal courts have held it entitled to.

We shall not discuss the first of these two essentials because one of the questions involved, to-wit: as to whether or not the drainage statutes in so far as they purport to authorize drainage for a purpose other than the drainage of agricultural lands, are in conflict with the state Constitution, is of such nature, while the others are as clearly not. None of such questions, however, has been so passed upon by the Supreme Court of the state as to create any conflict.

The state court has never had before it for determination the question as to whether or not the drainage statutes, in so far as they purport to authorize drainage proceedings for any purpose other than that of draining agricultural lands, are violative of the state Constitution. In all cases in which the constitutionality of the statutes has been passed upon by that court the only questions involved were those with reference

to the drainage of agricultural lands, and the court very correctly held that such drainage might be provided for without the incorporation of drainage districts.

The case of *Gilseth v. Risty*, 193 N. W. 132, decided after the decision of the district court in this case, is chiefly relied upon by petitioners as establishing the alleged conflict between the state and Federal courts. The opinion in that case discloses the following situation: plaintiff was the owner of agricultural land within the drainage area of Drainage Ditches No. 1 and No. 2 as originally constructed; he was a party to the conferences alleged by respondent in this case to have taken place between the parties interested in the original ditch proceedings, which conferences resulted in the filing of the petition "for the re-establishment of Drainage Ditches No. 1 and 2;" he was present at the hearing upon that petition and took no appeal from the order of the county commissioners purporting to establish the new drainage; his property, as we have said, was in the drainage area as originally established and he was one of the parties responsible for the original construction of the ditches in question and for their proper maintenance, and one of the parties for whose benefit petitioners are attempting to assess respondent's property and that of others outside the original drainage area.

The court simply held that as to him, a party to the proceeding, the order establishing the drainage and subsequent orders from which he did not appeal, became final. A careful analysis of the opinion discloses that the court finally based its conclusion upon questions of estoppel and lack of equity in favor of plaintiff. After reciting the situation practically as above stated, it said: "Appellant having stood by and seen all the work performed without protest, and having received all the benefits that could result therefrom, should not now be permitted to escape payment for the same. The relief asked by appellant is equitable in its nature, but because of the circumstances above shown, all the equities of the case are against appellant and in favor of the board."

We submit that nothing that was actually decided in the *Gilseth* case is in conflict with the decision of the Circuit Court of Appeals with reference to the rights of respondent here. There is nothing in the *Gilseth* case which would preclude any able lawyer from conscientiously advising respondent that the questions upon which his rights depend have not been passed upon by the state court.

Respondent had no property within the original drainage area; it was not a party to the original proceedings; it was not named nor any of its property described or referred to in the proceedings resorted to for the purpose of enlarging the drainage area.

No constitutional question or question of the power to assess property outside the original drainage area was involved in the *Gilseth* case, and there could not have been a decision

in that case, based upon the facts as disclosed by the opinion, that would even furnish any assistance to another court in determining respondent's rights here. The Federal courts, in seeking to avoid conflict, are certainly not obliged to follow the dicta of state courts or give any effect to unnecessary or unessential statements in their opinions.

We respectfully submit that the writ of certiorari should not be granted.

JOHN H. ROEMER,
Chicago, Illinois.

R. M. CAMPBELL,
Chicago, Illinois.

HAROLD E. JUDGE,
Sioux Falls, South Dakota.

Solicitors for Respondent.

IN THE

Supreme Court of the United States.

OCTOBER TERM, [redacted] 1925

No. [redacted] 98

A. G. RISTY ET AL., AS COUNTY COMMISSIONERS, ET AL.,
Appellants,

vs.

NORTHERN STATES POWER COMPANY,
Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION TO DISMISS APPEAL.

HAROLD E. JUDGE,
JOHN H. ROEMER,
R. M. CAMPBELL,
Counsel for Appellee.

DUNLAP-WARREN PRINTING COMPANY, CHICAGO.

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List of Authorities Cited.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1924.

No. 454

A. G. RISTY ET AL., AS COUNTY COMMISSIONERS, ET AL.,
Appellants,

vs.

NORTHERN STATES POWER COMPANY,
Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION TO DISMISS APPEAL.

AND NOW COMES the appellee and moves the court to dismiss the appeal herein for the following reasons:

I. The fact that opposite parties to the suit were citizens of different states was sufficient to give jurisdiction to the Federal courts and the Federal questions raised by the pleadings were disposed of by the Circuit Court of Appeals in accordance with the contentions of appellants; wherefore this court has no jurisdiction of the case on appeal.

II. This case in the lower court did not involve a dispute or controversy as to the validity, construction

or effect of the Constitution of the United States upon the determination of which the result depended; wherefore the Supreme Court has no jurisdiction on this appeal to review the judgment and decree of said Circuit Court of Appeals.

III. Appellants having elected to appeal from the District Court to the Circuit Court of Appeals are bound by the decision on that appeal and cannot have the case again reviewed by appeal to the Supreme Court.

Respectfully submitted,

HAROLD E. JUDGE,
JOHN H. ROEMER,
R. M. CAMPBELL,
Counsel for Appellee.

ARGUMENT ON MOTION TO DISMISS APPEAL.

I.

STATEMENT.

This case is here on appeal from a decision of the United States Circuit Court of Appeals for the Eighth Circuit affirming the judgment of the United States District Court for the District of South Dakota. The action was brought in the District Court by appellee to restrain the County Commissioners and other county officials of Minnehaha County, South Dakota, from levying an assessment against the property of appellee under Chapter 5 of the South Dakota Revised Code, 1919, and amendments thereof, usually referred to as the South Dakota Drainage Act. The right to an injunction was asserted on two Federal grounds, one that the Drainage Act was invalid because violative of the Constitution of the United States, the other, that the assessment was so arbitrary and discriminatory as to constitute the taking of appellee's property without due process of law and to deprive appellee of the equal protection of the law (P. R. 79-80), and also upon the non-Federal ground that even if the statute were valid, the right to make an assessment did not exist under its terms.

The District Court held the Drainage Act valid but granted the injunction on other grounds asserted. The Circuit Court of Appeals expressly refused to decide the Federal questions and affirmed the lower court on the non-Federal questions upon which the decision of that court proceeded. With this appeal, appellants filed a petition for writ of certiorari to the Circuit Court of Appeals, which has been denied by the court.

The case is one of those in which the decision of the Circuit Court of Appeals is final under Judicial Code, Section 128, unless it involves some ground of Federal jurisdiction other than that of diversity of citizenship.

The bill of complaint in paragraphs I and II thereof alleges as a ground of Federal jurisdiction, the diversity of citizenship between the plaintiff therein, Northern States Power Company, a Minnesota corporation, and the defendants, who are residents and citizens of the State of South Dakota. (P. R. 4.)

In paragraph XVI of the bill there is an allegation of facts authorizing jurisdiction in the Federal Court upon the ground that the suit is one of a civil nature in which a law of the State of South Dakota is claimed to be in contravention of the Constitution of the United States. (P. R. 13.)

In the trial court, it was contended by the plaintiff, appellee here, that the drainage law of South Dakota was invalid because it contravened the Constitution of the United States. The appellants who were defendants below, in their answer specifically "allege that said suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court, in that this suit is wholly based upon the alleged existence of a Federal question and diversity of citizenship, and that the amount sued for and the value of the special matter as alleged in said bill is not truly stated or alleged in food faith." (P. R. 24.) The defendants in the trial court, appellants here, specifically deny the allegations of paragraph XVI of the bill (P. R. 13) in which it was charged that the South Dakota Drainage Act was in contravention of the Constitution of the United States, and state that said allegations were made with the fraudulent purpose of imposing upon the jurisdiction of the court.

Throughout the trial of the case in the District Court, and in the appeal to the Circuit Court of Appeals, the appellants contended that the South Dakota Drainage Act was constitutional and valid. In this contention they were entirely successful in the District Court, the trial judge having held that the act was constitutional. (P. R. 88.)

In the Circuit Court of Appeals' opinion by Judge Kenyon, it is stated that the constitutional questions raised are grave, serious and doubtful, but that their determination is not necessary to the solution of the case—hence, under the well established rule that Federal courts will not pass upon the constitutionality of statutes unless it is absolutely necessary, the question is left aside. (*Risty, et al.* v. *Chicago, R. I. & P. Ry. Co.,* and five other cases, 297 Fed. 710.)

It is thus clear that both in the District Court and in the Circuit Court of Appeals, the question of the constitutionality of the South Dakota law was disposed of in accordance with the contentions of appellants. In both courts, the question was left aside; in the District Court, because the trial judge held the act was constitutional; in the Circuit Court of Appeals because that court found it was immaterial whether the act were constitutional or not.

What was actually done was to analyze the statute in the light of the record and to reach the conclusion that the County Commissioners, as drainage officials, were not authorized by the South Dakota law to do the things they were seeking to do. In other words, the courts construed the South Dakota statute and under their construction of it, found that the County Commissioners, appellants, had no authority in the statute for proceeding with the assessment against appellee.

II.

THE SUPREME COURT HAS NO JURISDICTION TO REVIEW THE JUDGMENT OF THE LOWER COURT ON THIS APPEAL BECAUSE THE CASE DOES NOT REALLY AND SUBSTANTIALLY INVOLVE A DISPUTE OR CONTROVERSY AS TO THE VALIDITY, CONSTRUCTION OR EFFECT OF THE CONSTITUTION UPON THE DETERMINATION OF WHICH THE RESULT DEPENDS.

The only ground of Federal jurisdiction considered by the Circuit Court of Appeals was that of diversity of citizenship. The allegations that the South Dakota law was unconstitutional and that the action of the drainage officers amounted to taking appellee's property without due process of law and to a deprivation of the equal protection of the law, were not essential to the result reached in the litigation.

We direct attention to the case of *Arbuckle* v. *Blackburn*, 191 U. S. 405, 48 L. Ed. 239, 24 S. C. R. 148, where this language appears:

> "In the present case the Circuit Court had jurisdiction on the ground of diverse citizenship; but it is now contended that jurisdiction also rested on the ground that the suit was one arising under the Constitution of the United States.
>
> The rule is firmly established that a suit does not so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution, upon the determination of which the result depends, and which appears on the record by a statement in legal and logical form, such as is required in good pleading. *Defiance Water Co.* v. *Defiance*, 191 U. S. 184, *ante*, 140; 24 Sup. Ct. Rep. 63, and cases cited."

In the case of *Empire State, etc. Mining Co.* v. *Hanley*, 195 U. S. 292, 49 L. Ed. 1056, 25 S. C. R. 691, this language occurs:

> "The decisions of the courts below did not turn

> on any Federal question. The circuit court held that Hanley had no title to the one-third interest because the Idaho statute relating to probate sales had not been complied with; the court of appeals, that Hanley was not entitled to the aid of a court of equity in respect of that interest, because of his conduct at the time of the transaction."

We think it may be said in the instant case, as was said by Mr. Chief Justice Fuller in the case last cited, that the decision of the Circuit Court of Appeals did not turn on any Federal question; in fact, there can be no question but that the language of the Chief Justice is pertinent. It is beyond cavil that the Federal questions pleaded here were not those upon the determination of which the final result depended.

The principle now being discussed is well stated in the case of *Shulthis* v. *McDougal,* 225 U. S. 561, 56 L. Ed. 1205, in the following language:

> "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends."

In the case of *Lovell* v. *Newman,* 227 U. S. 412, 57 L. Ed. 577, the discussion of this matter contained in *Shulthis* v. *McDougal, supra,* is repeated and approved; said quotation being followed by this question:

> "Does it, then, appear in the petition in the present case, in addition to averments of diverse citizenship, that the petitioner has asserted a ground of jurisdiction which 'really and substantially involves a dispute or controversy respecting the validity, construction, or effect of a law of the United States, and upon which his right to recover depends?' "

The question above states the problem to be solved in determining whether or not the Supreme Court has jurisdiction in a case brought there by direct appeal.

The justices of the Supreme Court say that in order to invoke the jurisdiction of Federal courts the petitioner must assert a ground of jurisdiction which "really and substantially involves a dispute or controversy respecting the validity, construction or effect of a law of the United States, upon the determination of which the result depends." That language means exactly what it says. It may be contended that the justices had in mind, in making and repeating the solemn assertion to which we have referred, the result of a decision upon the particular allegation of unconstitutionality without reference to the decision of the case where other issues are involved. Their opinions have not so limited the meaning of the language, however, but have made such broad assertion time and again. Not only has it been stated positively, but the same rule has been conversely laid down.

In the case of *Henningsen* v. *United States Fidelity and Guaranty Co.* 208 U. S. 404, 52 L. Ed. 547, 28 S. C. R. 389, Mr. Justice Brewer said, in denying a motion to dismiss:

> "A motion is made to dsimiss on the ground that the jurisdiction of the Circuit Court was invoked solely on the ground of diversity of citizenship of the parties, and hence the decree of the Circuit Court of Appeals was final. The motion must be overruled. Diversity of citizenship was, it is true, alleged in the bills, but grounds of suit and relief were also based on the statutes of the United States, as from the discussion of the merits will be seen. Those statutes entered as elements into the decision of the circuit court of appeals, and were necessary elements."

It cannot be said that the Constitution of the United States, or a Federal question, entered as an element into the decision of the Circuit Court of Appeals from which this appeal was taken. They did enter as elements in the case decided by Mr. Justice Brewer and were necessary elements. It was that fact which gave the Supreme Court jurisdiction in that case, and it must follow that if the Constitution or some Federal question had not entered as a necessary element in the case, the Supreme Court would have been without jurisdiction.

A Federal question to give jurisdiction to this court on appeal, must be essential to the disposition of the case. It must be so substantially fundamental that it cannot be set aside. The ends of justice must require its consideration and determination. In our judgment, jurisdiction to review this case on appeal does not exist here on the ground that Federal questions are involved, because those questions, as pleaded, do not really and substantially involve a dispute as to the validity, construction or effect of the constitution, upon the determination of which the result depends.

III.

APPELLANTS HAVING ELECTED TO APPEAL FROM THE DISTRICT COURT TO THE CIRCUIT COURT OF APPEALS ARE BOUND BY THE DECISION ON THAT APPEAL AND CANNOT HAVE THE CASE AGAIN REVIEWED BY APPEAL TO THE SUPREME COURT.

If appellants had the right to have the judgment of the United States District Court reviewed by the Supreme Court, it was essential for the exercise of such right that a direct appeal to that court be taken. While such direct appeal must be taken on jurisdictional grounds, it is settled that when so taken the Supreme

Court must review the whole case and decide all questions involved, both jurisdictional and nonjurisdictional.

Horner v. *United States,* 143 U. S. 570; 36 L. Ed. 266.

Burton v. *United States,* 196 U. S. 283; 49 L. Ed. 482.

Williamson v. *United States,* 207 U. S. 425; 52 L. Ed. 278.

Wilson v. *United States,* 232 U. S. 563; 58 L. Ed. 728.

Having elected, however, to take the case by appeal from the District Court to the Circuit Court of Appeals for review, the appellants are bound by the decision there.

This court held in *Robinson* v. *Caldwell,* 165 U. S. 359, 41 L. Ed. 745, and later in *Loeb* v. *Trustees of Columbia Township,* 179 U. S. 472, 45 L. Ed. 280, approved the doctrine, that "it was not the purpose of the judiciary act of 1891 to give a party who was defeated in a Circuit Court of the United States the right to have the case finally determined upon its merits both in this court and in the Circuit Court of Appeals." No amendment of the Judiciary Act referred to now indicates any such purpose or permits such right. *Ohio* v. *Swift & Co.* 260 U. S. 146, 67 L. Ed. 176.

In the case of *Cary Manufacturing Company* v. *Acme Flexible Clasp Company,* 187 U. S. 427, 47 L. Ed. 244, this language is used:

> "Although it is insisted that the judgment imposing the fine was a final judgment in a criminal matter, it is argued that it involved the denial of constitutional rights, and hence that this court has jurisdiction under Sec. 5 of that act; but it is settled that even if a party might be entitled to come directly to this court under that section, yet if he

does not do so, and carries his case to the circuit court of appeals, he must abide by the judgment of that court."

In *Ayers* v. *Polsdorfer*, 187 U. S. 427, 47 L. Ed. 314, it is said:

"Therefore, when the jurisdiction of the circuit court is invoked solely on the ground of diversity of citizenship, two classes of cases can arise, one in which the questions expressed in Section 5 appear in the course of the proceedings, and one in which other Federal questions appear. Cases of the first class may be brought to this court directly, or may be taken to the circuit court of appeals. But if taken to the later court they cannot then be brought here. Cases of the second class must be taken to the circuit court of appeals, and its judgment will be final. The case at bar falls under one or under the other of those classes."

IV.

THE FEDERAL QUESTIONS PLEADED HAVING BEEN DISPOSED OF IN ACCORDANCE WITH THE CONTENTIONS OF APPELLANTS CANNOT BE THE BASIS OF JURISDICTION ON APPEAL BY THEM.

We have already pointed out the manner in which the Federal questions were disposed of in the lower court. That disposition was in favor of appellants. They are now seeking to have the matter reheard in the Supreme Court on grounds which have already been disposed of in their favor and to their advantage. If the Supreme Court takes jurisdiction of this case it cannot render a decision on the Federal questions advanced by appellee that will be of any more benefit to appellants than was that of the Circuit Court of Appeals. If the Supreme Court passes on these questions at all, and its decision is to benefit appellants, the court will have to hold that

the South Dakota law was constitutional. Having so held, it must then go further and review the case upon grounds of jurisdiction which are not Federal in their nature so far as the questions at issue are concerned. If the Supreme Court says that the South Dakota act is constitutional and valid it must then begin at the very place where Mr. Justice Kenyon began after he had set the constitutional questions aside. There would be nothing left in the case except to analyze the South Dakota law and construe it in the light of the facts contained in the record in order to determine whether or not under that law the County Commissioners had the right to do what they were seeking to do in the matter of the assessment of benefits. This can be done where diversity of citizenship is the basis of Federal jurisdiction, as well as where a Federal question is pleaded. If the Supreme Court holds the South Dakota act unconstitutional, there will then be no occasion to review the decision of the Circuit Court of Appeals at all.

We think it is well established by the decisions of the Supreme Court that a litigant may not appeal from a decision in his favor. Referring again to the case of *Empire State* v. *Hanley*, 195 U. S. 292, 49 L. Ed. 1056, 25 S. C. R. 691, we find this language:

> "Appellants succeeded in their defense as to the one-third interest, and Hanley accepted the result on the second appeal. They now make a grievance of their own success, and ask that the supposed constitutional question as to the third interest only be made the basis of jurisdiction here, although, if the decree disposed of any such question, it was in their favor. In our opinion this cannot be permitted."

The language quoted is pertinent and apt in the instant case. Here the appellants succeeded in their defense as to the constitutionality of the law of South Dakota and hence there is no good reason why they

should be permitted to make a "grievance of their own success" any more than was true in the case from which the quotation is taken. The fact of the matter is that the sole purpose of the appeal is to get the Supreme Court to review the decision construing the South Dakota law and the only purpose that the allegation of unconstitutionality of the state law can possibly serve for the appellants is to give them access to the Supreme Court. Having succeeded in their contention that the law is valid, they cannot use the dispute as to its constitutionality, already disposed of in their favor, as a stepping stone to the Supreme Court in order to have another issue reviewed.

Until the Federal question involving its validity has been disposed of in their favor, it would be impossible for any court to hold with appellants in the construction of the South Dakota law. This question has already been disposed of in favor of appellants and they are not in position to have it reviewed. They have nothing in that regard of which to complain.

We call attention to the case of *Lampasas* v. *Bell*, 180 U. S. 276, 45 L. Ed. 527, 21 S. C. R. 228. The following paragraph is important both for the sententious way in which it expresses the law and for the distinguished authority by which that expression is supported:

> "We said in *Clark* v. *Kansas City*, 176 U. S. 114, 44 L. Ed. 392, 20 Sup. Ct. Rep. 284 (quoting from Cooley, Const. Lim. Sec. 196) that 'a court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and * * * who has therefore no interest in defeating it.' That is, a legal interest in defeating it. The objection of unconstitutionality of a statute must be made by one having the right to make it, not by a stranger to its grievance. 'To this extent only is it necessary to go in order to secure and protect the rights of all persons against the unwarranted

> exercise of legislative power, and to this extent only, therefore, are courts of justice called on to interpose.' *Wellington, Petitioner,* 16 Pick. 87, 96, 26 Am. Dec. 631, 635."

If there was a grievance involved in the disposition of the Federal questions raised in the lower court, that grievance belonged to appellee, and appellants were strangers to it. Indeed, they were the direct beneficiaries of the disposition of those questions when they were set aside by the lower court.

In the case of *Loeb* v. *Trustees of Columbia Township,* 179 U. S. 472, 45 L. Ed. 280, it is asserted that under Revised Statutes, Section 709 (Judicial Code, Section 237), the Supreme Court "can review the final judgment of a state court upon writ of error sued out by the party who is denied a right, privilege or immunity specially set up or claimed *by him* under the Constitution or laws of the United States." The opinion points out, however, that Section 5 of the Circuit Court of Appeals Act (Judicial Code, Section 238) does not limit the right of review to the party making the claim, and says further:

> "In other words, if a claim is made in the circuit court, no matter by which party, that a state enactment is invalid under the Constitution of the United States, and that claim is sustained or rejected, then it is consistent with the words of the act, and, we think, in harmony with its object, that this court review the judgment at the instance of the unsuccessful party, whether plaintiff or defendant."

The claim that the South Dakota Drainage Law violates a provision of the Fourteenth Amendment to the Constitution of the United States was urged by appellee in the District Court. That claim was rejected and the contention of appellants in that regard was there expressly sustained. That ruling constituted ground for

review at the instance of appellee by direct appeal to the Supreme Court under Section 238 of the Judicial Code. *Louisville and Nashville Railroad Company* v. *Western Union Telegraph Company*, 234 U. S. 369, 34 Sup. Ct. 810, 58 L. Ed. 1356. But the ruling of the District Court on the question of the validity of the state law, did not constitute ground for review at the instance of appellants for the very sufficient reason that this question was decided in their favor. In their appeal to the Circuit Court of Appeals, the appellants had no grievance to complain of except the decision of the District Court to the effect that the action of the drainage officers was not warranted by the Drainage Act. The Drainage Act was held valid and treated as a valid law.

In the Circuit Court of Appeals, appellee again urged the Federal questions, but they were ignored by the court because their determination was not essential to the result. This disposition of those questions had exactly the same effect on the appellants contentions as a holding that the South Dakota act was valid would have had. They have no grievance in this respect on which to base an appeal and no adverse ruling on a Federal question upon which to predicate jurisdiction in the Supreme Court. The judgment of the Circuit Court of Appeals is final because it is based on no jurisdictional grounds except diversity of citizenship.

We desire to call attention to the case of *Anglo-American Provision Co.* v. *Davis Prov. Co.* 191 U. S. 376, 48 L. Ed. 228. Here, in discussing the language of Section 238 of the Judicial Code authorizing appeals to the Supreme Court "in any case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States," Mr. Justice

Holmes, speaking for the court in a unanimous opinion, says:

> "Those words are general in form, but they do not mean that whenever a party makes a case of that sort he may appeal directly to this court whenever the decision is against him, no matter on what grounds, although his contention about the state law is sustained. If a party comes into the circuit court alleging that a state law is unconstitutional, and the circuit court decides for him on that point, the mere fact that there was such a question in the case does not authorize him to appeal to this court on grounds that otherwise would not support an appeal. See *Lampasas* v. *Bell*, 180 U. S. 276, 45 L. Ed. 527, 21 Sup. Ct. Rep. 368. The present case illustrates the principle. The argument for the appellant is devoted not to any constitutional or jurisdictional point, but to an attempt to upset the decision of the circuit court upon the question, mainly of fact, as to the good faith, etc., of Weed in taking the assignment of the judgment. The provisions of Sec. 5 of the act of 1891 were not intended to be made an instrument for such attempts."

It would seem that there is no escape for appellants from the decision last cited. They did not go into the court below as plaintiffs, but they did go as defendants alleging and contending that the state law was constitutional. The lower courts, both of them, disposed of that point in favor of appellants, and the mere fact that such a question was pleaded in the case does not authorize them to have the decision reviewed on appeal. It is true that the final decision of the lower court was against appellants, but it was not upon the point of the constitutionality of the Drainage Act. No court could do more for them in the disposition of that point than has already been done.

This appeal should be dismissed, because no Federal

question in the case was decided or disposed of against appellants.

All of which is respectfully submitted.

HAROLD E. JUDGE,
JOHN H. ROEMER,
R. M. CAMPBELL,
Counsel for Appellants.